Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Petitioner,

v.

WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Court of Appeals erred in holding that the Amended Complaint failed to state a cause of action under a state-created danger theory when all the elements under the Deshaney exception were met since the harm was foreseeable, Defendants acted in willful disregard for the safety of plaintiff and her class, a relationship existed between the state and plaintiff, and they used their authority to create an opportunity for harm that otherwise would not have existed?**

II. **Whether the Court of Appeals made an error of law in finding that the state tort wrongful death and survival actions were insufficient as a matter of law when the defendants were not entitled to immunity?**

III.. **Whether the Court of Appeals made an error of law in dismissing the state law claims against Defendant Koschalk?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at Appendix p.2A and was reported as Bright v. Westmoreland County. et al., 443 F.3d 276 (3d Cir.Pa.2006). Petitioner's Petition for Reconsideration and/or Rehearing was denied on May 22, 2006, per court order. The panel consisted of Third Circuit Judges Smith, Stapleton, and Nygaard. The opinion and order of the United States District Court for the Western District of Pennsylvania entered on February 25, 2005, granting Defendants' Rule 12(b)(6) motions to dismiss, appears at Appendix p. 42A.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered April 4, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.S §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Plaintiff John Bright filed this action as Administrator of the Estate of Annette Bright alleging the violation of her civil rights under 42 U.S.C. §1983 and ancillary state tort violations by defendants, Westmoreland County, probation officers, the City of Monessen and one of its police officers, the Westmoreland County Court Administrator and its District Attorney, and John Koschalk arising from the murder of Annette Bright by Koschalk who was in violation of his parole from an earlier corruption of minors charge. Included in the allegations were a claim of state-created danger with willful disregard of the Plaintiffs' safety under 42 U.S.C. §1983, state wrongful death and survivorship actions, and the state tort of assault and battery.

Initially, this case was assigned to the Honorable Arthur J. Schwab of the United States District Court for the Western District of Pennsylvania. The district court granted the Motions to Dismiss filed by Defendants Westmoreland County, Tami Whalen, Richard Yesko, Anthony C. Guinta, and John Peck, as well as Defendants City of Monessen and Carl Franzaglio and Paul S. Kuntz. The district court also dismissed all claims against Defendant Koschalk for lack of jurisdiction.

After an appeal to the Third Circuit, which yielded a reversal and remand with orders to engage in an independent judicial review of all claims and prepare an opinion explaining the reasons for its order, Bright filed an amended complaint in the district court to which all previously named Defendants responded with Renewed Motions to Dismiss. Subsequently, the district court, once again, granted the motions based upon the failure to state a cause of action and dismissed all claims against Defendant Koschalk for lack of jurisdiction.

imately, a second appeal was taken to the Third Circuit. Follow ral argument, a majority of the panel, consisting of Circuit Judges Smith, Stapleton and Nygaard, affirmed the grant o Defendants' Motions to Dismiss pursuant to Rule 12(b)(6), to which Judge Nygaard dissented. The opinion was published at Bright v. Westmoreland County. et al., 443 F.3d 276 (3d Cir.Pa.2006). In sum, the majority of the panel, in the opinion authored by Circuit Judge Stapleton, found no reversible error and otherwise affirmed that Appellant Bright had failed to state a cause of action under §1983, namely in that he failed to establish a violation of the Due Process Clause of the Fourteenth Amendment as per the state created danger exception under Deshaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189 (1989).

Upon a Petition for Rehearing, as submitted to the judges who participated in the decision of the Third Circuit Court and all other available circuit judges of the circuit in regular active service and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc the petition for rehearing was denied. Notably, Circuit Judges Rendell, Ambro and Fuentes would have granted rehearing. Also, as members of the original panel, Senior Circuit Judges Stapleton' and Nygaard's votes were limited to panel rehearing.

The facts of the case follow:

On or about March 4, 2000, Defendant Charles Koschalk, approximately 34 years of age, kept a twelve year old female overnight in his truck in the woods without the child's parents' knowledge of her whereabouts. On or about May 31, 2000 , Defendant Kolschalk entered a guilty plea to corrupting the morals of a minor and was placed upon twenty-three months probation, with credit for time served. The effective end of the probation wa

scheduled for April 30, 2002. The defendant Koschalk was placed under the supervision of the Westmoreland County Adult Probation Department which included the three individual defendant probation officers.

A specific condition of probation was that Defendant Koschalk was to have no direct or indirect contact with the twelve year old victim of the corrupting minors charge and/or any minor children (without adult supervision). Despite this condition of probation, Defendant Koschalk continued to make attempts to carry on an unsupervised relationship with the twelve year old victim.

On or about May 4, 2001, at 20:09 hrs, Defendant Probation Officer Tami Whelan personally observed and confronted Defendant Koschalk with the twelve year old victim, unsupervised, at the Target Store in Greensburg. The probation officer considered this a direct violation of the Court Order. Defendant Probation Officer Whelan prepared a report in support of a violation petition on or about May 16, 2001. On or about June 15, 2001, a formal violation document alleging the above unauthorized contact was signed by Probation Officer Richard Yesko for Probation Officer Whelan. On or about June 18, 2001, Probation Supervisor Anthony C. Guinta signed the violation document requesting that a final revocation hearing be scheduled for Defendant Koschalk. On or about June 27, 2001, a Petition to Revoke Defendant Koschalk's probation was filed through Defendant District Attorney's office by and through an assistant district attorney. On or about August 6, 2001, the Westmoreland County Court Administrator's Office issued a notice that a hearing on the Petition for Revocation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County.

However, on or about July 15, 2001, eight year old Annette

Bright was shot and killed by means of a shotgun wound to the head. She had a family relationship (sister) with the twelve year old victim of the aforementioned corrupting a minor charge. On o about January, 2003, Defendant Koschalk entered a plea of guilty to the charge of first degree murder in the homicide of Annette Bright. He has been sentenced to life in prison without parole and is currently incarcerated.

A period of approximately ten weeks expired from the dat on which the Probation Officer observed the direct violation of th Court Order and the time when the victim's relative, also a minor, was shot and killed. During this time, there was no arrest, detention, or service of papers upon Defendant Koschalk. This inexplicable delay was the responsibility of the processing system as administered by Defendants Probation Officers, Court Administrator, District Attorney and/or their staffs or personnel.

Approximately three weeks before the murder of Annette Bright, John Bright, related to the minors (father), contacted Officer Carl Franzaglio of the City of Monessen Police Department. Officer Franzaglio had been the prosecuting officer the initial corruption of minors charge against Defendant Koschal

Mr. Bright, aware that the probation officer had confronte Koschalk violating his probation by continued contact with the twelve year old victim, requested Officer Franzaglio to take immediate action to incarcerate Koschalk for the protection of his family. Defendant Officer Franzaglio assured Bright that immediate action would be taken. However, nothing occurred to detain Koschalk prior to the murder on July 15, 2001.

Koschalk murdered Annette Bright, in part, in retaliation efforts made by the family to prevent him from seeing the twelve year old relative/victim of the corrupting minors charge.

The Complaint alleges that the actions of the Defendants, individually and/or jointly, created a state-created danger and/or otherwise violated the established special relationship between the government defendants and victim of the homicide resulting in legal harm to Annette Bright and her family. More particularly:

a. An express condition of probation was for Koschalk to have no unsupervised contact with the twelve year old victim of the corrupting morals charge and/or other minors.

b. The assigned probation officer had direct knowledge that a violation of that condition had occurred on or about May 4, 2001 and specifically confronted Koschalk regarding it.

c. Despite this confrontation, Koschalk was not detained, arrested, or even notified of a revocation process until several weeks after the homicide.

d. A family member of Annette Bright, fearing harm to the family, specifically requested an arrest to the prosecuting officer and received assurances that such action would be taken immediately.

e. These affirmative actions of the Defendants served to embolden Koschalk, who despite confrontation, saw no enforcement action. Additionally, assurances of action encouraged the family's reliance upon the authorities.

f. The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or

detention in the face of known probation violations, which violations created and/or should have created immediate concern for the safety of the affected minors constituted a state-created danger and/or violation of a special relationship and/or other duty owed to the victim and her family.

The Complaint alleges that the homicide was directly and proximately caused by the affirmative acts and/or the deliberate indifference and/or failure to enforce, despite actual knowledge, th court-ordered conditions of probation. Further, the effect of direct confrontation with Koschalk, coupled with the aforementioned inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family.

The Complaint alleges a civil rights cause of action including violations of the right to due process of law and/or to be free from state-created dangers and/or non-protection in violation of legally recognized special relationships.

The Complaint alleges that Defendants Westmoreland County and the City of Monessen and individual defendant officers have established, developed, ratified, approved or otherwise encouraged by and through its agents and/or employees, the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedures, including the following:

a. Defendant City of Monessen has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediat arrest procedures and/or prompt processing of revocation

petitions under circumstances evident in this case.

b. Defendant City encouraged the instant conduct by failing to take any disciplinary action whatsoever despite notice. As a result of these failures, Defendant City has failed to protect the public, including Plaintiffs, as outlined.

c. Defendant City fully ratified the conduct of police officers.

d. Westmoreland County and its policymakers has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediate arrest procedures, and/or prompt processing of revocation petitions under circumstances evident in this case.

The Complaint also set forth state tort causes of action of wrongful death and/or survivorship action against all defendants, and assault and battery against Defendant Koschalk. *See* First Amended Complaint at App., p.64 A.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether proper tests for the state-created danger exception under Deshaney are being fairly and uniformly applied in the circuit courts and whether the same support a theory of emboldenment.

Many legal scholars have recognized the problematic and erratic growth of the state-created danger theory which has arisen as an exception to Deshaney's canonical rule that the Due Process

Clause of the Fourteenth Amendment does not create an affirmative duty for state actors to protect individuals from the harm inflicted by private third parties.

As noted in a recent law review article:

> " It is evident, on a most superficial view, that a vast amount of judicial inconsistency exists among the federal circuits with regard to the state-created danger theory. Specifically, the conflicts surrounding the state-created danger concept exist on three distinct and prominent levels. First, a split exists between the circuits refusing to accept the state-created danger theory. Second, contrary conclusions about the scope and application of the state-created danger concept exist among the circuits that recognize the theory. Finally, intracircuit conflicts exist among several of the circuits recognizing the state-created danger theory. Thus, given the wide gulf of disparity among the circuits, confusion and unequal treatment of litigants living in different judicial districts inevitably occurs."

See Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations under Section 1983.* 37 Val.U.L.Rev. 177, 210 (2003).

When analyzing both the intercircuit and intracircuit conflicts, one is quick to recognize that some circuits place special emphasis on certain key elements not always recognized by other circuits. See id. at 224. One specific area of judicial inconsistency, particularly relevant to the case sub judice, involves the "action-inaction" distinction relevant to the fourth element of the Third Circuit's state-created danger test which entails a determination of whether the state actors used their authority to create an opportuni

that otherwise would not have existed for the third party's crime to occur. See id. at 225-26, and *see also* Kneipp v. Tedder, 95 F.3d 119 (3d Cir. 1996); Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir.1995); Morse v. Lower Merion Sch. Dist., 132 F.3d 902,908 (3d Cir. 1997); and Rivas v. City of Passaic, 365 F.3d 181, 197 (3d Cir.2004).

According to the aforementioned article, making the action-inaction distinction and furthermore requiring affirmative action on behalf of the state actor ignores the straightforward and explicit command of §1983's legislative history and prior Supreme Court precedent. *See* 37 Val.U.L.Rev. 177 at 226. Based upon this particular scholar's research, the spirit, intent, and purpose of §1983's enactment was to combat law enforcement inaction in the face of Klan terrorism in the post-Civil War South. See id. at 227. Moreover, in light of this Court's holding in Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), which stated that a proper regard for §1983's genesis requires that §1983 be broadly construed because it was enacted as a remedial measure, it is clear that the action-inaction distinction is fundamentally flawed. See id. at 229. As Justice Brennan stated in his dissent in Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 212 (1989), intentional inaction by a state can be just as abusive and oppressive as action. See id. at 230. In sum, the scholar opined that the action-inaction distinction "is a classic example of a distinction without a difference." Id.

In the instant case, counsel for the Petitioner expresses a belief, based on a reasoned and studied professional judgment, that the Panel's decision in Bright v. Westmoreland County, et al., 443 F.3d 276 (3d Cir.Pa.2006), is contrary to decisions of the United States Court of Appeals for the Third Circuit, as well as among other circuits, and involves one or more questions of exceptional importance, to wit: whether this Court should clarify the distinction

between the affirmative acts and omissions of state actors under the various state-created danger tests arising as exceptions to Deshaney v. Winnebago Cty. Soc.Servs.Dept., 489 U.S. 189 (1989), and further address the viability of the emboldenment theory of liability under the same.

It is respectfully submitted that the Third Circuit Panel's decision in question essentially overlooked and/or otherwise improperly disregarded the crux of Appellant's state-created danger claim by distinguishing between the allegations of affirmative and omissive conduct on behalf of the Appellees and then disposing of them in conclusory fashion. Overall, it is argued that the lower court's rationale is contrary to recent decisions of the Third Circuit which reject the affirmative act/omission inquiry as per the fourth element of the state-created danger test and stand for the proposition that the conduct must be looked at in its entirety to determine whether the state placed the plaintiff in a position of enhanced danger.

In his dissent, Judge Nygaard began by stating in pertinent part:

> "I believe that the majority incorrectly states the elements of our state created danger exception in such a way that leads them to incorrectly identify the dispositive inquiry that drives our state-created danger test. This mis-focus, in turn, has caused them to make analytical missteps in assessing the adequacy of the claim presented in this case. It is axiomatic that the pleadings in this case must be taken in their entirety in ruling upon a motion under Rule 12(b)(6). In my view, when assessed cumulatively, they establish not only the existence of affirmative acts, but more importantly, that the state used its authority to place the plaintiff in a position of enhanced danger, thereby meeting the fourth element of the state-created danger test. Hence I respectfully dissent."

See J. Nygaard's dissent at App., p. 28 A.

As noted by Judge Nygaard's dissent, and further posited by Appellant here, the Third Circuit made it clear in Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir.1997), that when addressing the question of whether a state actor has used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur, "[t]he dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission." Morse, 132 F.3d at 915, and *see also* J. Nygaard's dissent, App. p.32 A.

In line with the Third Circuit's shift away from the affirmative act versus omission distinction found in Morse is the holding in Rivas v. City of Passaic, 365 F.3d 181 (3d Cir. 2004). There, the circuit court determined that a reasonable fact finder could conclude that, when taken together, the conduct of the defendant EMTs in calling the police for backup, informing them that the plaintiff had assaulted them, failing to inform them of his medical condition and then abandoning control over the situation, created an opportunity for harm that would not have otherwise existed. See Rivas, 365 F.3d at 197 (emphasis added). Importantly, there was no distinction made between the so-called affirmative action of calling the police for back up and the apparent omissive action of failing to inform, instead it was held that the combination of defendants' conduct had enhanced the danger to the plaintiff, who later died as a result thereof. See id.

Similarly, in the instant case, it is clear that the lower courts were not, nor is this Court, simply faced with defendants who stood idly by letting events unfold as they may, but rather the facts as alleged, demonstrate a combination of both action and inaction that

served to create the opportunity for foreseeable harm. Appellee Probation Officer Whalen did not merely respond to a complaint and then leave the scene after witnessing no apparent crime, but instead witnessed a direct probation violation, used her authority tc confront the violator, failed to arrest and/or detain Defendant Koschalk, and then waited several weeks to file a report of the violation which resulted in an inexplicable delay of nearly ten weeks before Defendant Koschalk was even notified of a revocation hearing, unfortunately after the murder of Annette Bright. (See First Amended Complaint at paragraphs 30(h), 31, App., pp.69-70A .)

It is this very combination of action and inaction that is alleged to have served to embolden Koschalk to carry out his retaliation against the Bright family and the effect of the conduct can be seen to cut two ways. First, it can be inferred that the confrontation served to anger Koschalk by interfering with his illicit relationship with Annette Bright's sister, thus exacerbating the already contentious situation. Second, it can further be inferred that the failure to arrest or detain Koschalk, followed by the delay in reporting and processing the violation, served to embolden Koschalk, seeing no direct consequence for his actions and believing that he would not confront effective law enforcement as he progressed with his scheme to retaliate against the Bright family

The Third Circuit Panel's majority opinion makes short shrift of Bright's emboldenment theory by distinguishing between the affirmative and omissive conduct on behalf of the Defendants, ultimately isolating the allegations and then dispensing with them in conclusory fashion. In particular, the majority stated, "[t]he reality of the situation described in the complaint is that what is alleged to have created a danger was the failure of the defendants t utilize their state authority, not their utilization of it." (See Opinior at App., pp.19-20A). Moreover, Circuit Judge Stapleton concludec

that "[b]ased on the allegations of the complaint as a whole, however, one cannot reasonably infer that there was any connection between Officer Whalen's accusing Koschalk of a probation violation and Koschalk's decision to murder Annette ten weeks later." (See id. at p.20A).

The Opinion goes further to assert that even if Koschalk was emboldened by the ten week delay in processing the probation violation, "[i]t could not be reasonably attributed, however, to the probation officer's calling a probation violation a probation violation when confronted with it on May 4th." (See id.). And Judge Stapleton opines that the so-called confrontation placed the Brights in no worse position than that in which they would have been had the state not acted at all, "[i]n short, the Brights were at no greater risk immediately following the confrontation than they were when it commenced." (See id. at p.21A).

Appellant Bright respectfully submits that such conclusory findings were premature at the motion to dismiss stage of the proceedings, since he was entitled to the benefit of the inferences from his complaint. This matter should have been permitted to proceed to give Bright his opportunity to garner factual support to establish the pled theory of emboldenment. This is not an idle claim since investigation has revealed a series of letters from Koschalk which Bright believes support his theory. At a minimum, it cannot be said as a matter of law, that the emboldenment theory is unsupportable, without even the depositions of the proper parties.

Furthermore, it is contended that as alleged the Defendants served to aggravate the potentially explosive situation. The probation officer confronted the unstable Koschalk, then took no effective action. The police assured the family of an upcoming arrest, but took no effective action. The family struggled without help to discourage the illicit relationship between the 34 year old

male and their twelve year old daughter. With time, while the government dithered and delayed, this explosive mix festered and ultimately matured with the shooting death of the eight year old family member, the victim of Koschalk's unleashed retaliatory impulse. Clearly, a jury could determine that the government's affirmative act of confrontation coupled with the subsequent half measures made the situation worse. Had the government never been involved, Bright would have been starkly confronted with the choices available to protect his family: move from the area or physically confront Koschalk. But the government's half measures encouraged Bright to stay and try to rely upon the law while the situation worsened making his family the ultimate target of Koschalk's retaliation.

As Judge Nygaard noted in his dissent, the confrontation with Koschalk itself plays an integral role in creating an opportunity for harm that would otherwise not have existed and accordingly places this case outside the purview of Deshaney and firmly within the ambit of the state-created danger exception. (See Opinion at App., pp. 35-36A). Appellant Bright agrees with Judge Nygaard that by characterizing his claim as based solely on the ensuing delay in taking action, "...the majority lops off the initial affirmative act so it can conclude that there was no affirmative act. (See id. at p.36A).

Ultimately, Bright contends that such reasoning ignores the crux of his claim that the affirmative act of confrontation, similar t the initial act of the EMTs in Rivas, when viewed in combination the subsequent omissive conduct, created an opportunity for harm that otherwise would not have existed, thus satisfying the fourth element of the state-created danger test. And as Judge Nygaard reasoned, "[r]egardless of whether Bright can ultimately prove this if our test is to have any content, he is at least entitled to try." (See id.).

Additionally, and as Judge Nygaard recognized in his dissent, this appeal poses the question of whether the Third Circuit's state-created danger exception supports a theory of emboldenment, a specific question which has never been addressed head on by that court. (See Opinion at App., p.37A). Appellant Bright submits that in light of the critical importance of this question and the recognition of the "emboldenment" theory in other circuits, this Court should clarify its position on the viability of such a claim.

Considering the fact that the "emboldenment" theory has been recognized by other courts, a close review of the opinions demonstrates that the precedent strongly supports Appellant's claim that a cause of action here exists. In May v. Franklin County Board of Commissioners, 2003 WL 1134499 (6th Cir. 2003) the emboldenment theory was specifically recognized as having been sufficiently pled to create a question for the jury. The opinion provided:

> "May argues that the facts pled in her complaint establish that Ratliff's conduct increased the risk that Kirk would be deprived of life and liberty in violation of the substantive due process clause. She first says that Ratliff's behavior--going to the door, knocking, and then leaving--emboldened Moss because it diminished his fear of arrest...According the facts alleged, Ratliff's actions emboldened Moss and so increased Kirk's vulnerability to harm. She would have to prove at trial that these actions in fact emboldened Moss, but that is a question for a jury to decide. If May could show culpability, then she could proceed to a jury on that basis." Supra 793 - 794 .

The court accepted the fact that the police officers intervening in the process and then leaving without action (quite similar to the probation officer's confrontation without effective follow-up in the instant case) was sufficient to establish that the third party was emboldened so as to increase the victim's vulnerability to harm. Since the issue was raised on a motion to dismiss it was held that the pleadings were sufficient to establish that the defendant officer has a duty to protect her after emboldening the third party by going to her apartment, knocking and then leaving.

Notably, the court in May declined to go forward on the basis that those particular facts did not "shock the conscience. In making the determination of whether government action is conscience shocking, more culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. In May, the police officer acted quickly with the murder occurring promptly after his investigation. In the instant case over ten weeks was allowed to pass, granting the officers much more time to militate against the harm which ultimately resulted. It should further be noted that the Sixth Circuit once again recognized the validity of the emboldenment theory on the same set of facts, although it was ultimately held that the plaintiff had not proven the same. See May v. Franklin County Commissioners, et al., 437 F.3d 579, 585 (6th Cir. 2006).

Additionally, Brown-Alleyne v. White, 1999 WL 1186809 at *3 (E.D.N.Y. 1999) similarly recognized the "emboldenment" theory. In material part, that opinion provided as follows:

> "Drawing all reasonable inferences in favor of the plaintiff, the complaint can be read as alleging the following. Mooney and perhaps other officers

agreed with the District Attorney's office, the Housing Authority, and the Department of Corrections not to punish White for his 1992 assault on plaintiff and not to prevent future assaults. White knew of this agreement , or at least was emboldened by the absence of repercussions, leaving plaintiff more vulnerable to future violence at his hands. When such violence occurred in 1995, the defendant police officers acted in furtherance of this conspiracy by escorting White from the building and later berating plaintiff for calling the police." (Emphasis added).

While there was a suggestion of a pre-arranged failure to act, the court, in overruling the motions to dismiss, recognized that the absence of repercussions could well serve to embolden the third party. In that case, the pre-arrangement was the triggering event to the emboldenment. In the instant case, the confrontation, like in May, was the triggering event to the emboldenment.

These cases clearly recognize that pleading a credible "emboldenment" theory is sufficient to withstand a 12(b) 6 Motion to Dismiss.

Plaintiff's First Amended Complaint added allegations, especially at paragraphs 30 f. 1-4 and 30 g. 1-2 and 30 h., establishing more clearly the factual foundation for the "emboldenment" theory. These added paragraphs follow:

f. (1) The petition to revoke probation contains the following averments by Tammy Whalen:

On May 4, 2001, at 20:09 this officer

witnessed and confronted the defendant with the victim at the Target store in Greensburg. This is a direct violation of the court order. (emphasis added).

(2) Kolschalk had been charged with corrupting the morals of Marcy Bright (Annette's sister), for the act of keeping the child overnight in a truck in the woods without her parents' knowledge of her whereabouts. Koschalk had picked her up on March 4, 2000, without parental permission; took her shopping and kept her overnight in his pick-up.

(3) Koschalk had written letters addressed to "Nut", his nickname for Marcy. In part, one letter provided, as follows:

"Feel real bad, like you really hate my guts. You don't understand, when I swear I will kill you, I mean that. You may tell your Mom and Dad or the police. By the time the cops knock on my door, I will be gone and you would better hope they catch me before I kill you and your family. I just will lose it, Nut, because I love you and will not let you go because we made plans to do things together."

(4) As noted above, the confrontation and failure of follow up, emboldened and/or encouraged Koschalk eventually to act on his misplaced emotional/psychological state. From his own correspondence his willingness to kill members of the Bright family would be encouraged when confronted with ineffective law enforcement

responses, as occurred here.

g. Approximately three weeks before the homicide,

(1) John Bright went to the Monessen Police station and spoke directly to Officer Franzaglio. Bright asked Franzaglio why Koschalk wasn't in jail. Franzaglio said he didn't know, as certainly Bright or Franzaglio would be in jail under similar circumstances. Franzaglio said he was going to District Attorney Peck for a warrant for his arrest.

(2) In reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his family, hence creating the opportunity for the damages ultimately sustained.

h. The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations, which violations created and/or should have created immediate concern for the safety of the affected minors constituted a state-created danger and/or violation of a special relationship and/or other duty owed to the victim and her family. (See Amended Complaint, App., pp. 70-72A).

A review of the case law demonstrates that Bright should have had the right to prove his allegations. See Brown-Alleyne v. White, and May v. Franklin County Board of Commissioners, supra.

Appellant Bright further directs the Court's attention to Judge Nygaard's dissent espousing his belief that the Third Circuit's state-created danger exception allows for a claim premised on the emboldenment theory. (See Opinion at App., p.37A). According to Judge Nygaard, "[t]o hold otherwise would render the state-created danger exception logically and analytically inconsistent." (See id.).

In Judge Nygaard's opinion, with which Appellant agrees, the claim in the instant case, for the purposes of the fourth element of the state-created danger test, is analogous to Rivas, supra. (See id.). The only difference is in the theory of how the claimed conduct placed the plaintiff in a position of enhanced danger, and J Nygaard saw no logical or analytical reason to allow Rivas' claim and not Bright's since the result is the same. (See id.).

Appellant Bright respectfully submits that predatory conduct by repeat offenders visited upon especially vulnerable minor children is a problem of legitimate national importance. When state probationary and law enforcement officials have actual knowledge of expressed probationary violations the law should be crafted so that they understand that willful disregard of such dangerous facts which results in actual harm to the minor population will require a thorough explanation and defense in a courtroom setting. If only one child is saved through a vigorous and fair application of the state-created danger test, the effort will be worthwhile.

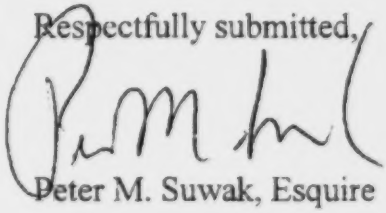
As Judge Nygaard so poignantly stated: "It is true that the Court in *Deshaney* sought impartiality in the face of 'natural sympathy.' *Deshaney*, 489 U.S. at 212. Importantly for the plaintiffs in this case, however, we should not plunder whatever merit that exhortatioin may have had. Tragedy should not incite

illegitimate influence; yet neither should it be dismissed before it has had a chance to plead its case." *See* Opinion, J. Nygaard's Dissent at App., p.39A.

CONCLUSION

Petitioner respectfully requests that this Court grant the Petition.

Respectfully submitted,



Peter M. Suwak, Esquire

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 15, 2006

Mr. Peter M. Suwak
Pete's Surplus Building
P.O. Box 1
Washington, PA 15301

Re: John Bright, Individually and as Administrator of the Estate of Annette Bright, Deceased
v. Westmoreland County, et al.
Application No. 06A173

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 15, 2005 extended the time to and including October 19, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Sutter, Clerk
By
Heather Trant
Case Analyst

On Appeal Fr(Court
For the We i
(D.C. Civil Action No. 03-cv-01072)
District Judge: Hon. Arthur J. Schwab

Argued October 19, 2005

BEFORE: SMITH, STAPLETON and NYGAARD,
Circuit Judges

(Opinion Filed April 4, 2006)

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OPINION OF THE COURT

STAPLETON, Circuit Judge:

John Bright, on behalf of himself and his daughter Annette's estate, appeals from an order dismissing his complaint for failure to state a claim. That complaint purports to allege a Substantive Due Process claim under the "state-created danger doctrine" and several state law claims. For present purposes, we accept the facts alleged in Bright's

complaint as true. Based on those facts, we will affirm the judgment of the District Court.

I.

Thirty-four-year-old defendant Charles Koschalk ("Koschalk") pled guilty to a charge of corrupting the morals of a twelve-year-old girl, Annette Bright's sister. He was sentenced to 23 months of probation. As conditions of his probation, he was to have no contact with his 12-year-old victim and no unsupervised contact with any other minor. On probation, Koschalk was under the supervision of Westmoreland County Adult Probation Department and three of its employees – defendants Tami Whalen, Richard Yesko, and Anthony Guinta. During his probation, Koschalk continuously violated his parole by attempting to carry on a relationship with the 12-year-old victim of his crime.

The complaint alleges the following with respect to one of those probation violations and the ensuing proceedings:

> 16. On or about MAY 4, 2001, AT 20:09 hrs, Defendant Probation Officer Tami Whelan personally observed and confronted Defendant Koschalk with the twelve year old victim, unsupervised, at the Target Store in Greensburg. The probation officer considered this a direct violation of the Court Order.
>
> 17. Defendant Probation Officer Whelan

prepared a report in support of a violation petition on or about May 16, 2001.

18. On or about June 15, 2001, a formal violation document alleging the above unauthorized contact was signed by Probation Officer Richard Yesko for Probation Officer Whelan.

19. On or about June 18, 2001, Probation Supervisor Anthony C. Guinta signed the violation document requesting that a final revocation hearing be scheduled for Defendant Koschalk.

20. On or about June 27, 2001, a Petition to Revoke Defendant Koschalk's probation was filed through Defendant District Attorney's office by and through an assistant district attorney.

21. On or about August 6, 2001, the Westmoreland County Court Administrator's Office issued a notice that a hearing on the Petition for Revocation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County.

First Amended Complaint, App. at 54a-55a.

In late June, 2001, Bright called defendant Officer Carl Franzaglio of the City of Monessen Police Department to ask him to arrest Koschalk. Officer Franzaglio had some familiarity with the case because he was the prosecuting officer in the proceeding against Koschalk stemming from his crime against the 12-year-old. After Bright described the situation, Officer Franzaglio assured Bright that immediate action would be taken, but no detention of Koschalk occurred.

On July 15, 2001, before his probation revocation hearing was scheduled, Koschalk shot and killed Annette Bright, the eight-year-old sister of the victim of his earlier crime. Koschalk murdered Annette Bright to retaliate against the family for its efforts to prevent him from seeing the 12-year-old victim.

Bright's complaint concludes its statement of a claim under 42 U.S.C. § 1983 with the following allegations:

> The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations . . . constituted a state-created danger . . . . The homicide was directly and proximately caused by the affirmative acts and/or the deliberate indifference and/or failure to enforce, despite actual knowledge, the court-ordered conditions of probation. Further, the effect of direct

> confrontation with Koschalk, coupled with the aforementioned inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family.

First Amended Complaint at ¶¶ 30(h), 31, App. at 58a.

In addition to the violation of Annette Bright's federal civil rights, Bright's complaint also alleges state law wrongful death and survival claims against all of the defendants and assault and battery claims against Koschalk.

The District Court granted the defendant's Rule 12(b)(6) motion to dismiss the § 1983 state-created danger claims. It concluded that these claims "must fail . . . because the state actors did not use their authority to create an opportunity for harm that would not otherwise have existed." District Ct. Op., App. at 13a-14a. The District Court also dismissed Bright's state law claims against the state-actor defendants on the ground that they were entitled to immunity under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. § 8541, *et seq.* ("PPSTCA"). Finally, the District Court declined to exercise supplemental jurisdiction over the state law claims against Koschalk. This timely appeal followed.

II.

We begin our evaluation of Bright's "state-created

danger" claim with a review of the Supreme Court's decision in *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). Joshua DeShaney was physically abused by his father. The respondents, social workers and local officials, had ample reason to believe Joshua's father was abusing him and, at one point, secured temporary custody of Joshua. They ultimately returned Joshua to his father, however, and the violence continued, resulting in severe brain damage. Joshua and his mother "sued respondents claiming that their failure to act deprived [Joshua] of his liberty in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 191. The Supreme Court held that it did not, and affirmed a summary judgment for the respondents.

Based upon its text, history, and case law, the Court concluded that the Due Process Clause did not impose an affirmative obligation on the state to protect its citizens:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

* * *

> Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.
>
> * * *
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney, 489 U.S. at 195-96.

Significantly for present purposes, the petitioners in *DeShaney* contended that, even if there was no affirmative duty to protect the public generally, "a special relationship" existed between Joshua and the state giving rise to such a duty "because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger." *DeShaney*, 489 U.S. at 197. The Supreme Court expressly "reject[ed] this argument." *Id.* at 198. It held that it is only when the state takes custody of a citizen, thereby depriving him of his liberty, that it assumes an affirmative duty to protect him or her from harm.

> [Our cases] stand only for the proposition that when the State takes a person into its custody

> and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 199-200.

Applying these principles to Joshua's case, the Court concluded that the state had no duty to protect him even though state actors had, at one point, taken temporary custody of Joshua and then returned him to his father:

> Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at

> all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

DeShaney, 498 U.S. at 201 (footnote omitted).

DeShaney stands for the proposition that the Due Process Clause imposes no affirmative duty to protect a citizen who is not in state custody.[1] As the last quoted paragraph suggests, however, this does not mean that no constitutional violation can occur when state authority is affirmatively employed in a manner that injures a citizen or renders him "more vulnerable to injury from another source than he or she would have been in the absence of state intervention." *Scheiber v. City of Philadelphia*, 320 F.3d 409, 416 (3d Cir. 2003). This complement to the *DeShaney* holding has come to be known in its progeny as the "state-created danger doctrine."

Our case law establishes the following essential elements of a meritorious "state-created danger" claim:

> (1) "the harm ultimately caused was foreseeable and fairly direct;"[2]

---

[1] Bright does not invoke the "state custody" exception to the general rule of *DeShaney*. *Compare Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (holding that an affirmative duty to protect may exist in the context of foster care).

[2] *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996).

(2) a state actor acted with a degree of culpability that shocks the conscience;[3]

(3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general;[4] and

(4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.[5]

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[3] *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (1999); *Scheiber v. City of Philadelphia*, 320 F.3d 409, 416 (2003).

[4] *Kneipp*, 95 F.3d at 1209, n.22; *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906, 913 (3d Cir. 1997).

[5] *See DeShaney*, 489 U.S. at 201 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. . . . [The State] placed him in no worse position than that in which he would have been had it not acted at all"); *Rivas v. City of Passaic*, 365 F.3d 181, 195 (3d Cir. 2004) (articulating the fourth element as requiring that

It is important to stress, for present purposes, that under the fourth element of a state-created danger claim, "[l]iability under the state-created danger theory is predicated upon the states' *affirmative acts* which work to the plaintiffs' detriments in terms of exposure to danger." *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1374 (3d Cir. 1992) (*en banc*) (emphasis supplied); *Brown v. Grabowski*, 922 F.2d 1097, 1100-01 (3d Cir. 1990) (finding that *DeShaney* holds "that a state's failure to take affirmative action to protect a victim from the actions of a third party will not, in the absence of a custodial relationship . . . support a civil rights claim"). It is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause.

While we have acknowledged that the line between action and inaction may not always be clear, *D.R.*, 972 F.2d at 1374, we have never found a state-created danger claim to be meritorious without an allegation and subsequent showing

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"the state actor used his authority to create an opportunity for danger that otherwise would not have existed"). *See also* Laura Oren, *Safari into the Snake Pit: The State Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J. 1165, 1187 (2005) (arguing that this element in our Circuit's state-created danger doctrine "may be broken down into its constituent parts: (1) Did state officials exercise authority or power; (2) in such a way that they put someone in a worse position than they would otherwise have occupied?").

that state authority was affirmatively exercised.[6] Contrary to Bright's suggestion, *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir.

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[6] If there were any inconsistency in the holdings of our prior cases regarding the fourth element of a state-created danger claim, the controlling precedent would be our *en banc* decision in *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3d Cir. 1992). While acknowledging that the line between action and inaction is sometimes difficult to draw, we there affirmed what *DeShaney* clearly teaches: the Due Process Clause proscribes only state action and, accordingly, liability "under the state-created danger theory [can only] be predicated upon the state's affirmative acts which work to plaintiffs' detriment in terms of exposure to danger." 972 F.2d at 1374. We perceive no conflict, however, between *D.R.* and those cases which phrase the fourth element in terms of whether "state actors used their authority to create an opportunity that would not otherwise have existed" for injury to the plaintiff. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). In our view, "state actors" cannot "use their authority" to create such an opportunity by failing to act. *Rivas* is not to the contrary. There, two state actors, emergency medical technicians, affirmatively used their state authority to create an opportunity for injury to the plaintiff by summoning the police and providing them with information that could be expected to cause the police to treat the plaintiff's decedent in a highly dangerous manner – *i.e.*, "Garcia and Rodriguez informed the police that Mr. Rivas had assaulted one of them but did not inform the police about Mr. Rivas's medical condition or warn the officers that Mr. Rivas should not be restrained." 365 F.3d at 195. We perceive little similarity between that case and this.

1996), and *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902 (3d Cir 1997), do not indicate otherwise. In *Kneipp*, the police stopped a couple on the street in the middle of the night for causing a disturbance. The wife was intoxicated to the point of being unable to walk without assistance. While the police initially detained both of them, they subsequently gave the husband permission to go home. He departed, assuming that the police were going to take her either to the hospital or the police station. At some point after his departure, the police sent the wife home alone, resulting in her fall to the bottom of an embankment and serious injury. We affirmed, finding that there was "sufficient evidence in the summary judgment record to show that . . . the police officers used their authority as police officers to create a dangerous situation or to make [the wife] more vulnerable to danger [than] had they not intervened. . . . As a result of the affirmative acts of the police officers, the danger or risk of injury to [the wife] was greatly increased." *Kneipp*, 95 F.3d at 1209.

In *Morse*, we characterized the issue raised under the fourth element of a state- created danger claim as whether "the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.'" *Morse*, 132 F.3d at 915 (quoting from *Marks v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995)). We affirmed the District Court's dismissal of the complaint, however, based on the plaintiff's failure to satisfy the first element of a state-created danger claim, *i.e.*, on the facts alleged, the third parties' "deadly attack was not a foreseeable and fairly direct result of defendants' behavior."

Id. at 915-16.[7]

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[7] As the dissent notes, *Morse* observes: "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission." *Morse*, 132 F.3d at 915. It is important to put this observation in context, however. This sentence appears in *Morse*'s discussion of the district court's application of the fourth element of the test. The district court identified a single alleged affirmative act—the defendants having unlocked the back door to a school through which the plaintiff's attacker entered—and expressed uncertainty as to whether this affirmative act was sufficient to establish liability. We concluded the question of whether an affirmative act was required had been answered by *Mark v. Borough of Hatboro*. *Mark* articulated the fourth element of the test as requiring that "state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). A use of authority that creates an opportunity for harm necessarily entails an affirmative act. But an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff. In *Morse*, this meant asking whether unlocking the door created a foreseeable opportunity for the plaintiff to be attacked by a mentally ill intruder. Only then would the state actor have "used its authority to create an opportunity which otherwise would not have existed for the specific harm to occur." *Morse*, 132 F.3d at 914. In this context, we do not read *Morse*'s language to suggest liability can be

III.

Bright insists that the state actor-defendants caused Annette Bright's death in three ways: (1) the "inexplicable delay" by numerous state actors in pursuing the revocation of Koschalk's parole left him in a position to kill Annette; (2) Officer Franzaglio's assurance that Koschalk would be taken into custody was relied upon by Bright and resulted in Bright's failing to take steps to protect Annette; and (3) Officer Whalen's confrontation of Koschalk in May and the want of any prompt follow-up by the state actors "emboldened" him to commit a crime he otherwise would not have committed. Like the District Court, we find it unnecessary to consider anything other than the fourth essential element of a meritorious state-created danger claim.[8]

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based on an omission alone or a failure to act. We read it to clarify that the relevant test involves asking whether a state actor's behavior constituted an affirmative act, and, if so, whether the affirmative act created a foreseeable opportunity for harm.

[8]Judge Smith would hold that the motion to dismiss was also properly granted based on Bright's failure to plead facts sufficient to satisfy the first prong of the state-created danger test. In his view, the harm ultimately caused was a not "foreseeable and a fairly direct result of the state's actions." *Morse*, 132 F.3d at 908. Because the crime of corrupting the morals of a minor is different in degree and kind from the crime of murder, it is not – without more – foreseeable to a state actor that failing to detain a pedophile will result in homicide. In

We conclude that the state cannot "create danger" giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.

A.

Bright argues that this case is unique because "the probation officer personally witnessed the offending violation and was in a position to act promptly," but there was an "inexplicable delay" of ten weeks before a probation revocation hearing was scheduled. Br. Appellant at 26. This theory of liability based solely on a failure of the state to act is clearly foreclosed by *DeShaney*. Even if Officer Whalen's knowledge of the encounter at Target could be reasonably regarded as knowledge of a danger to Annette, we know from *DeShaney* that no affirmative duty to protect arises "from the State's knowledge of the individual's predicament." *DeShaney*, 489 U.S. at 200. Liability requires affirmative state action; mere "failure to protect an individual against private violence" does not violate the Due Process Clause. *Id.* at 197.

B.

Judge Smith's view, because Bright failed to allege that state officials had any knowledge of any threatening or criminal conduct except the probation violation itself, Annette Bright's murder was not a foreseeable result of the state's action.

Officer Franzaglio assured Bright approximately three weeks before Annette's death that Koschalk would be arrested and "[i]n reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his family, hence creating the opportunity for the damages ultimately sustained." First Amended Complaint ¶ 30(g)(2), App. at 58a. State-created danger liability cannot be predicated on these facts, however. The Supreme Court has spoken directly to this matter. Bright does not, and cannot, claim that the state in any way restricted his freedom to act on his family's own behalf. The *DeShaney* Court specifically held that, under these circumstances, no "affirmative duty to protect arises . . . from the State's . . . *expressions of intent to help*" an individual at risk. *DeShaney*, 489 U.S. at 200 (emphasis added). Once again, the governing rule is that there can be no liability in the absence of an affirmative exercise of state authority.

C.

Finally, Bright alleges that the parole officer's "confrontation with Koschalk, coupled with . . . inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family." First Amended Complaint ¶ 31, App. at 58-a. Here, again, Bright seeks to bring the law enforcement delay within the scope of the state-created danger doctrine by pointing to an affirmative action of the state which preceded it. The reality of the situation described in the complaint is that what is alleged to have created a danger was the failure of the defendants to

utilize their state authority, not their utilization of it. Bright has identified no action of the defendants that utilized their state authority in a manner that rendered Annette more vulnerable to Koschalk than she would otherwise have been. It is Officer Whalen's alleged decision not to arrest in May and the ensuing ten week delay about which Bright complains. It is that failure to arrest and detain that his brief argues created the danger, made Annette's death foreseeable, and was the product of deliberate indifference.

It is true, as we have noted, that Bright's complaint alleges in conclusory fashion that it was both Officer Whalen's "confrontation with Koschalk" *and* the "inexplicable delay" that "emboldened" Koschalk. Based on the allegations of the complaint as a whole, however, one cannot reasonably infer that there was any connection between Officer Whalen's accusing Koschalk of a probation violation and Koschalk's decision to murder Annette ten weeks later. It is specifically alleged that what "emboldened" Koschalk and thereby contributed to that decision was a belief "that he would not confront effective law enforcement action as he progressed with his scheme to retaliate." First Amended Complaint at ¶ 31, App. at 58a. It is the state's creation of that belief that is said to have rendered Annette more vulnerable than she would otherwise have been. We may assume for present purposes that the creation of that belief could reasonably be attributed to the ten week delay in serving Koschalk with notice of his probation violation hearing. It could not reasonably be attributed, however, to the probation officer's calling a probation violation a probation violation when confronted with it on May 4th.

While a probation officer here took affirmative action seeking compliance with the court's protective order, just as the social workers took affirmative action to secure and then relinquish custody of Joshua DeShaney, the Due Process Clause did not require that Westmoreland County "become the permanent guarantor" of the Bright family's safety from private violence any more than it required Winnebago County to "become the permanent guarantor" of Joshua's safety from the same sort of harm. *Id.* at 201. As in *DeShaney*, the only affirmative exercise of state authority alleged in this case – the so-called "confrontation" – "placed [the Brights] in no worse position than that in which [they] would have been had [the state] not acted at all." *Id.* In short, the Brights were at no greater risk immediately following the confrontation than they were when it commenced. With respect to the ensuing delay in exercising state authority, here, as in *DeShaney*, the "most that can be said of the state functionaries in this case is that they stood by and did nothing when . . . circumstances dictated a more active role for them." *DeShaney*, 489 U.S. at 203. The confrontation was not a misuse of state authority, and the subsequent failure to exercise state authority was not a violation of the Due Process Clause under *DeShaney*.

IV.

Turning to Bright's state claims, the District Court determined that Westmoreland County, the City of Monessen, and the individual state employees were entitled to immunity from those claims. It further concluded that it should decline to exercise its supplemental jurisdiction with respect to Bright's claims against Koschalk.

On appeal, Bright does not challenge the merits of the District Court's determination that the county and city were entitled to municipal immunity. Rather, he insists that the Court, having dismissed the federal claims, should have declined to entertain any of Bright's state claims. With respect to the claims against the individual state defendants, Bright argues, in the alternative, that these defendants were not entitled to immunity under the PPSTCA. Finally, Bright insists that, if the District Court properly decided to determine the state claims against the county, the city, and their employees, it should not have abstained with respect to the claims against Koschalk.

A.

While our Court reviews district court decisions to exercise supplemental jurisdiction for abuse of discretion, *see DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003), we have also found that:

> [W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.

Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995).

The District Court recognized this rule and explained

that there were no "extraordinary circumstances" here that would "warrant the exercise of jurisdiction over the state claims" against Koschalk. App. at 19-a. While it did not expressly address why it was proceeding to exercise jurisdiction over the other state claims, we believe that the District Court's reason for distinguishing between the two classes of claims is both apparent and appropriate.

Governmental immunity – such as immunity for municipalities and for public employees acting within the scope of their duties under 42 Pa. Cons. Stat. §§ 8541, 8545 – serves the public interest in avoiding burdening the state and its employees with unnecessary litigation. Pennsylvania immunity law appears to be no exception. *See Kuzel v. Krause*, 658 A.2d 856, 858 (Pa. Commw. Ct. 1995) ("Sovereign and governmental immunity involve the constitutional question of the Commonwealth consenting to be sued and the effect those suits would have on the public purse . . . ."). *See also In re Upset Sale*, 522 Pa. 230, 232 (Pa. 1989) (finding the defense of municipal immunity non-waivable by litigants because "a governmental agency cannot be put at the mercy of negligent . . . waiver by counsel of a substantive right designed to protect its very existence"). The public interest protected by immunity doctrine has prompted our Supreme Court to advise that immunity issues should be resolved "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

Understandably, the state defendants filed their motions to dismiss the state claims on immunity grounds

shortly after learning of this action against them, and those motions were briefed and argued simultaneously with the motions to dismiss the § 1983 claims for failure to state a claim. Accordingly, at the point when the District Court concluded that the federal claims should be dismissed, it was in a position to rule without delay on the state defendants' entitlement to immunity. Given that any further delay in ruling on that entitlement would undermine an important objective of the state in recognizing such immunity, it is not surprising that the District Court exercised jurisdiction with respect to the motions of the state defendants while declining to do so with respect to Koschalk, who had no claim of immunity. In fairness to the state-actor defendants, the District Court could hardly have done otherwise.

B.

The District Court concluded that the individual state-actor defendants were entitled to immunity under PPSTCA because Bright's allegations "could not support a finding that the individual defendants 'intended to violate the law or bring about the harm that resulted to the plaintiffs.'" *Id.* at 17a (quoting from *Leidy v. Borough of Glenolden*, 277 F.Supp.2d 547 (E.D. Pa. 2003)). We agree.

Under § 8545 of the PPSTCA, a municipal employee "is liable for civil damages on account of any injury to a person or property . . . only to the same extent as his employing local agency . . . ." 42 Pa. Cons. Stat. § 8545. Local agencies are given broad immunity in 42 Pa. Cons. Stat. § 8541 which is qualified by eight exceptions that do not

apply to this case. The PPSTCA contains an additional exception from immunity where a public employee is concerned:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 . . . shall not apply.

42 Pa. Cons. Stat. § 8550. "Willful misconduct" – the only clause that Bright argues describes the conduct of these defendants – has recently been defined as follows:

> Willful misconduct . . . has been defined by our Supreme Court to mean conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied. . . . To prove willful misconduct, a plaintiff must establish that the actor desired to bring about the result that followed, or at least it was substantially certain to follow, *i.e.*, specific intent.

Robbins v. Cumberland County Children and Youth Services, 802 A.2d 1239, 1252–53 (Pa. Commw. Ct. 2002). Our Court has also recognized that "'[w]illful misconduct' in this

context has the same meaning as the term 'intentional tort.'" *Brown v. Muhlenberg Township*, 269 F.3d 205, 214 (3d Cir. 2001) (citing *Delate v. Kolle*, 667 A.2d 1218, 1221 (Pa. Commw. Ct. 1995) and *Kuzel v. Krause*, 658 A.2d 856, 859 (Pa. Commw. Ct. 1995)). Thus, even where a public employee acts with a degree of culpability equivalent to "recklessness," Pennsylvania law nevertheless affords him immunity. *Williams v. City of Philadelphia*, 569 A.2d 419, 421-22 (Pa. Commw. Ct. 1995) ("[T]he failure [of two public employees] to take greater precautionary measures in light of the circumstances, exemplifies a reckless disregard of the existing danger; however, that behavior constitutes wanton, not willful, misconduct. . . . [T]hey are immune from liability under section 8545 of the Code.").

Bright does not allege that the individual state defendants desired to bring about harm to Annette Bright (or to her sister) or that they were aware that such harm "was substantially certain to follow." Rather, Bright alleges in his complaint that they acted with "deliberate indifference," App. at 58a, and argues in his brief that they "knowingly and deliberately disregarded a known risk." Br. Appellant at 26. Assuming *arguendo* that a reasonable jury could infer such culpability from the facts alleged, the individual state-actor defendants would still not have engaged in "willful" misconduct and would still be entitled to immunity.

C.

Bright has pointed to no considerations of judicial economy, convenience, or fairness to the parties which would

have provided the District Court with an affirmative justification for adjudicating the claims against Koschalk after dismissing the federal claims. And we perceive none.

V.

The judgment of the District Court will be affirmed.

NYGAARD J., dissenting:

I believe that the majority incorrectly states the elements of our state-created danger exception in such a way that leads them to incorrectly identify the dispositive inquiry that drives our state-created danger test. This mis-focus, in turn, has caused them to make analytical missteps in assessing the adequacy of the claim presented in this case. It is axiomatic that the pleadings in this case must be taken in their entirety in ruling upon a motion under Rule 12(b)(6). In my view, when assessed cumulatively, they establish not only the existence of affirmative acts, but more importantly, that the state used its authority to place the plaintiff in a position of enhanced danger, thereby meeting the fourth element of the state-created danger test. Hence, I respectfully dissent.

I. The Fourth Element of the State-Created Danger Test

The majority submits that the test developed in our Circuit to assess the adequacy of a state-created danger claim contains the word "affirmatively." Specifically, they state the fourth element of the test as whether:

> (4) a state actor *affirmatively* used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Maj. Op. at 9 (emphasis added). This, quite plainly, is an incorrect statement of our test. Since *Kneipp v. Tedder*, 95 F.3d 119 (3d Cir. 1996) enunciated our state-created danger

test, not one of our cases has inserted the word "affirmatively" into the fourth element of the test.[9] *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) ("Cases like these have four things in common: ... (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."); *Kneipp*, 95 F.3d at 1205 (applying the *Mark* 4-part test); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 908 (3d Cir. 1997) (quoting and applying the *Mark* 4-part test); *Smith v. Marasco*, 318 F.3d 497, 506 (3d Cir. 2003) (noting the fourth element of the *Kneipp* test as, "(4)[whether] the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."); *Scheiber v. City of Philadelphia*, 320 F.3d 409, 417 (3d Cir. 2003) (quoting the *Kneipp* test); *Rivas v. City of Passaic*, 365 F.3d 181, 197 (3d Cir. 2004) ("The last element of the *Kneipp* test asks whether the state actor used his or her authority to create an opportunity, which otherwise would not have existed, for the specific harm to occur."). The majority does not cite, nor can I find, any case or other form of support for its claim, today, that the test that our Circuit has developed

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[9]Our initial attempt to establish a test for the state-created danger exception to *Deshaney v. Winnebago Cty. Servs. Dept.*, 489 U.S. 189 (1989) can be traced to *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) even though it has, since *Kneipp*, been known as the *Kneipp* test. Recently, Judge Ambro accurately charted modifications to our test, leading him to question the appropriateness of continuing to refer to the *Deshaney* exception as the *Kneipp* test. *See Rivas v. City of Philadelphia*, 365 F.3d 181, 202-03 (3d Cir. 2004).

includes the word "affirmatively" in the fourth element.

II. The Central Inquiry and Analysis Under the Fourth Element

By its insertion, the majority signals its belief that the hallmark inquiry under the fourth element is whether the state's actions can be characterized as affirmative or not.[10] As I address below, this assertion stands quite starkly in contrast to the dispositive inquiry for addressing the state-created danger exception established by our Court.[11]

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[10]The majority states, "[i]t is important to stress, for present purposes, that under the fourth element of a state-created danger claim, '[l]iability under the state-created danger theory is predicated upon the states' *affirmative* acts which work to the plaintiffs' detriments in terms of exposure to danger.'" Maj. Op. at 10 (citations omitted).

[11]I am not suggesting that the presence of an affirmative act does not play a part in our state-created danger inquiry. To satisfy the fourth element, there still must be something more than simple inaction by the state even "when suspicious circumstances dictate[] a more active role." *Deshaney*, 489 U.S. at 203. However, this inquiry is limited in its effectiveness. As I discuss below, to hold that the mere *presence* of omissive acts abrogates any ability to satisfy the fourth element, especially when combined with other affirmative conduct, misconceives the nature of our test and the language from which the state-created danger exception derives: "[w]hile the state may have been aware of the dangers that Joshua faced in the free world, it

Our recent cases have shifted away from inquiring into the existence of affirmative acts as a standard to establish the fourth element of our test for a compelling reason: to so hinge our inquiry would center us squarely within the troublesome decisional thicket governing the distinction between action and inaction.[12] Writing for the Court in *Morse*, Chief Judge Scirica addressed the significance of this dilemma:

> one of the common factors in cases addressing the state-created danger is that the state actors "used their

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played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

[12] When the *Mark* Court formulated, for the first time, our Circuit's test for the state-created danger exception, it did so in full recognition of the United States Court of Appeals for the Seventh Circuit's articulation in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982):

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into the snake pit.

Bowers, 686 F.2d at 618. These words ring true today. As I explain later, the claim at issue in this case is exactly that the state put a person in a position of danger and then failed to protect them. To characterize this as a merely passive act is overtly wrong.

> authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *The dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission.*

Morse, 132 F.3d at 915 (emphasis added) (citations omitted). In *Morse*, we rejected the affirmative act/omission inquiry because of the difficulty it posed in reaching sound conclusions. *Id.* at 914 (noting that "[c]onduct that has been held to be an affirmative act under one set of facts has not met that standard in a similar setting."). And we criticized the District Court for reading the fourth element "to contemplate that a state actor must affirmatively act to create the risk which results in harm to the plaintiff." *Id.* at 914. We also explicitly recognized that the question of whether an affirmative act is required had already been answered. *Id.* at 915 ("[w]hether an affirmative act rather than an act of omission is required ... ha[s] been answered by *Mark*"). Consequently, as *Morse* represents a controlling case, I cannot join in the majority's assertion to the contrary, that the hallmark of our test is whether the acts can be characterized as affirmative.

Morse is not the only controlling case the majority elides. *Rivas* reflects our most recent chance to address the state-created danger exception and further cements *Morse's* rejection of the affirmative act/omission inquiry. There, Emergency Medical Technicians ("EMTs") called for police backup after encountering a severely psychotic and

convulsing middle-aged man. Upon the police officers' arrival, the EMTs informed them that the man, Mr. Rivas, had assaulted one of the EMTs. They failed to advise the police, however, that Mr. Rivas had a medical condition that explained his actions, and the EMTs then abandoned control over the situation. After an altercation with the police, Mr. Rivas was placed on stretcher and at some point stopped breathing and died. We found that the EMTs' conduct, taken cumulatively, satisfied the fourth element of the state-created danger test. Specifically, we concluded that the conduct "created an opportunity for harm that would not have otherwise existed" and that "were it not for those acts, Mr. Rivas presumably could have remained in the apartment's bathroom for the duration of his seizure without incident." *Rivas*, 365 F.3d at 197.

Looking closely at the relevant conduct in *Rivas*, it is clear that our approach under the fourth element of the state-created danger exception now rests some distance away from the affirmative act/omission inquiry. In *Rivas*, the conduct we found to have met the fourth element of the test involved an initial act by the EMTs - calling and informing the officers of Mr. Rivas' assault on one of the EMTs - and then two omissions - not advising the officers of Mr. Rivas' medical condition and abandoning control over the situation. We found this conduct to have met the fourth element of the test despite, or rather in spite of, any act/omission characterization that might have been made. Thus, *Rivas* stands both for our Court's shift away from the affirmative act/omission inquiry and also for the proposition that the conduct must be looked at in its entirety to determine whether the state placed the

plaintiff in a position of enhanced danger.

Today's case presents a set of pleadings which, if proven, would establish nearly identical conduct as that analyzed in *Rivas*. Bright claims that the initial confrontation between Koschalk and his parole officer, while Koschalk was violating his parole, and then the failure by that parole officer to take appropriate action on this violation emboldened Koschalk to believe he could act with impunity in carrying out his increasingly delusional and violent threats and plans. The conduct alleged here, when taken together, contains both an initial act - the confrontation between the parole officer and Koschalk - and then an omission - the parole officer's abdication of his responsibility to take action on a clear parole violation.

We cannot simply annul *Rivas'* prescription that it is the totality of the conduct that must be analyzed under the fourth element of the state-created danger exception. The majority dismisses Bright's claim on the basis that "Bright has identified *no action* of the defendants that utilized their state authority in a manner that rendered Annette more vulnerable to Koschalk than she otherwise would have been" and that "it is the ensuing ten week delay about which Bright complains." Maj. Op. at 15 (emphasis added). I am at a loss to understand how, based on the pleadings here, the majority could claim that there is "*no action* of the defendants that utilized their state authority in a manner that rendered Annette more vulnerable" to harm. Bright has repeatedly and specifically claimed that the confrontation itself was the trigger for

increasing Koschalk's disposition to violence.[13] Had there been no confrontation but rather merely a delay of enforcement, Bright could not successfully claim that Koschalk was emboldened to act more violently.[14] Instead,

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[13]As this appeal comes to us on a Rule 12(b)(6) motion, I cannot accept the majority's conclusory dismissal of the plaintiff's allegations. Bright must only satisfy the liberal notice pleading requirements under Rule 8(a). *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002). Accordingly, we are bound not to dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45–46 (1957). Additionally, we are bound to construe all reasonable inferences in favor of the plaintiff. *See id.* Thus, for the purposes of this case, we should not dismiss Bright's claims if the sum of all alleged facts would show that the state used its authority in a way that created a danger to the plaintiff or that rendered the plaintiff more vulnerable to danger than had the state not acted at all.

[14]Indeed, had Bright's claim alleged merely that the parole officer's failure to arrest Koschalk created an opportunity for harm that would not have otherwise existed, this would have been an easy case. Such a claim would clearly fail under the state-created danger doctrine, precisely because there would have been nothing to support the requirement that the state have placed the plaintiff in a position of enhanced danger. Such a pleading would be governed by *Deshaney's* rule requiring something more than mere idleness, even where circumstances

the confrontation itself plays an integral role in creating an opportunity for harm that would otherwise not have existed, placing this case outside the purview of *Deshaney* and firmly within the ambit of our state-created danger exception.

To highlight my problem with the majority's logic, if we applied it to the facts in *Rivas* it would read something like this: "the fault Rivas finds is solely with the EMTs' failure to disclose certain information and the abdication of responsibility. Because there is nothing affirmative in these acts, the claim cannot be sustained." The majority's approach, emphasizing as it does the necessity of characterizing acts as affirmative, only underscores its inadequacies. By cabining Bright's claim as based *solely* on an ensuing delay in taking action, the majority lops off the initial affirmative act so it can conclude that there was no affirmative act. I fail to understand how this analysis at all resembles the meaning of our fourth element inquiry.

Without belaboring the point more, the basis of Bright's claim is that the affirmative confrontational act, like the initial act of the EMTs in *Rivas*, taken together with the ensuing conduct, created an opportunity for harm that otherwise would not have existed, thus surpassing the threshold necessary to meet the fourth element of the state-created danger test. Regardless of whether Bright can ultimately prove this, if our test is to have any content, he is at least entitled to try.

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dictate a more active role, in order for a claim to be stated. *See Deshaney*, 489 U.S. at 203.

III. Emboldenment Claims under the State-Created Danger Exception

This appeal poses the question of whether our state-created danger exception supports a theory of emboldenment. Our Court has never addressed, head on, this specific question.

As the above analysis makes clear, Bright's claim, for the purposes of the fourth element of the state-created danger claim, is analogous to *Rivas*. Because we held that the claim in *Rivas* met the fourth element of the state-created danger test, so too, we must hold here. Implicit in my conclusion, then, is the belief that our state-created danger exception allows for a claim premised on an emboldenment theory. To hold otherwise would render the render the state-created danger exception logically and analytically inconsistent.

The majority rejects Bright's emboldenment claim by responding that, despite the pleadings to the contrary, Bright is unable to bring his claim within the state-created danger exception. This simple assertion, without more, is insufficient.

Importantly, the difference between *Rivas* and this case is not in the nature of the relevant conduct - in each case the plaintiff has pleaded a combination of affirmative acts and omissions - or in the general effect that the conduct has had on the situation - in each case the claimed effect was that the plaintiff was placed in a situation of enhanced danger.

Instead, the only difference is in the theory of how the claimed conduct placed the plaintiff in a position of enhanced danger. In *Rivas*, the alleged behavior put the plaintiff in a position of enhanced danger because the EMTs called the police and only disclosed certain information about the nature of the situation - information which affected the way the officers handled the situation - and then abandoned control over the event. We might say that this claim is premised on a theory of misrepresentation; that is, the EMTs' misrepresentation to the officers enhanced the danger to the plaintiff because it created a situation where the officers would act more violently. Here, Bright's claim is premised on a theory of emboldenment: the increased danger arose from Koschalk's confrontation with his parole officer and ensuing lack of effective enforcement because it emboldened Koschalk to act more violently.

I can see no logical or analytical reason to allow Rivas' claim and not Bright's. For the purposes of the fourth element, there is simply no functional difference between the two claims, precisely because the result is the same. In both, the state has acted to place the plaintiff in a position of increased danger. True, the claims posit different theories as to why the plaintiff was placed in a position of enhanced danger, but nevertheless, both establish the claim that, but for the state's conduct, the plaintiff would not have been placed in that position at all. Because our inquiry under the fourth element asks exactly this, both claims meet the test.

IV.

When viewed in light of our jurisprudence and our current position on the proper inquiry for the state-created danger exception, the majority's initial insertion takes on a significantly different character and changes materially our inquiry. By inserting the word "affirmatively," the majority reworks not only the actual language of our test, but also our central inquiry in light of *Morse* and *Rivas*.

Moreover, until today our case law has evidenced an unambiguous shift away from reliance on the frustratingly murky distinction between affirmative action and omission. I fear that with a single insertion, the majority succeeds in pulling us right back in. We have consciously and, I believe, prudently moved away from this distinction precisely because of the difficult and often fruitless analysis required therefrom. Thus it is true, as the majority asserts, that "[i]t is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." Maj. Op. at 10. But this statement proves too much. It exposes the principle, established in *Morse* and *Rivas*, that the central inquiry of our state-created danger test is whether the state placed the plaintiff in a position of enhanced danger. We cannot ignore this principle because we believe the inquiry should be something else. It is true that the Court in *Deshaney* sought impartiality in the face of "natural sympathy." *Deshaney*, 489 U.S. at 212. Importantly for the plaintiffs in this case, however, we should not plunder whatever merit that exhortation may have had. Tragedy should not incite illegitimate influence; yet neither should it be dismissed before it has had a chance to plead its case.

Upon the foregoing, I respectfully dissent.

PRECEDENTIAL

IN THE UNITED STATES COURT
OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-2005

JOHN BRIGHT, Individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,
Appellant

v.

WESTMORELAND COUNTY; TAMI WHALEN, Individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, Individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, Individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, Individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, Individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, Individually and in his capacity as District Attorney of Westmoreland County; CHARLES KOSCHALK

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Case No. 03-1072
Judge Arthur J. Schwab

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Plaintiff,

v.

WESTMORELAND COUNTY; TAMI WHALEN, Individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

MEMORANDUM OPINION

I. INTRODUCTION

This is a civil action brought pursuant to Pennsylvania Wrongful Death and Survival Acts and for violation of 42 U.S.C. § 1983. Plaintiff, John Bright, individually and in his

capacity as administrator of the estate of his daughter, decedent Annette Bright, alleges in a four count complaint that all defendants except defendant Charles Koschalk are liable to him under 42 U.S.C. § 1983 for depriving decedent and her family of their federally protected constitutional rights (Count I). Additionally, plaintiff alleges wrongful death and survival actions against all defendants except for defendant Koschalk (Counts II and III). Finally, plaintiff asserts a state law claim for assault and battery against defendant Koschalk (Count IV).[1]

On September 12, 2003, defendants filed their motion to dismiss federal cause of action with brief in support thereof. (doc. nos. 21 and 22). On September 24, 2003, plaintiff filed his response to the motion to dismiss with brief in opposition thereto. (doc. no. 23). On or about September 20, 2004, by Memorandum Opinion and Order of Court, this Court granted defendants' motion to dismiss on the basis: (1) plaintiff's complaint fails to state a cause of action for violation of 42 U.S.C. § 1983 under a state created danger theory; (2) plaintiff's wrongful death and survival actions fail as a matter of law; and, (3) plaintiff's remaining state law claims for assault and battery against defendant Koschalk must be dismissed for lack of jurisdiction.

Plaintiff appealed this Court's ruling and, on August 24, 2004, the United States Court of Appeals for the Third Circuit remanded this case for this Court to "re-evaluate the

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[1] No one has appeared of record for defendant Koshalk. According to the complaint, in January 2003, Koschalk entered a pleas of guilty to first degree murder of Annette Bright and has been sentenced to life in prison without parole. (doc. no. 48, amended complaint,¶25).

appellees' [defendants] motion to dismiss in a procedure consistent with this opinion." Bright v. Westmoreland County, 380 F.3d 729, 732 (3d Cir. 2004). Thereafter, on October 21, 2004, this Court conducted a status conference in this matter. At that time, defendants informed the Court that they intended to file renewed motions to dismiss. The Court, therefore, set a briefing schedule that was agreeable and acceptable to all parties. On December 10, 2004, defendants filed their renewed motions to dismiss with briefs in support (doc. nos. 36-41) and plaintiff thereafter filed his renewed response in opposition to the motions to dismiss with supporting brief (doc. no. 42).

In plaintiff's response in opposition to the motions to dismiss, counsel for plaintiff requested the Court entertain the option of allowing plaintiff to file an amended complaint.[2] After additional briefing on the issue of whether plaintiff was entitled to amend his complaint, on February 4, 2005, this Court entered an order granting plaintiff's motion to amend his complaint, and denying plaintiff's request for limited discovery.

Consistent with the February 4, 2005 Order, plaintiff filed his amended complaint on February 7, 2005, and the parties were allotted additional time to file supplemental or amended motions to dismiss and responses in opposition thereto. (doc. nos. 49-52).

In order to comply with the Court of Appeals'

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[2] The Court notes that plaintiff did not make a formal motion to amend at that time, but rather included that request in the body of his brief in opposition to the motion to dismiss. (Doc. No. 42).

directive, the Court will now re-evaluate defendants' renewed motions to dismiss (and supplements thereto) in a procedure consistent with its opinion. After careful consideration, and for the reasons that follow, this Court will grant defendants' renewed motions to dismiss.

II. FACTUAL BACKGROUND

For purposes of defendants' renewed motions to dismiss, this Court will accept the following allegations in plaintiff's first amended complaint as true. On May 31, 2000, defendant Koschalk (then approximately 34 years of age) pled guilty to a charge of corrupting the morals of a minor as the result of having spent the night with a 12-year-old female, who is the sister of decedent. (hereinafter referred to as "decedent's sister") (doc. no. 48, amended complaint ¶¶11 and 12). Defendant Koschalk was placed on 23 months probation, which, with credit for time served, was to last until april 30, 2002. (doc. no. 48 at ¶12). As part of his probation, defendant Koschalk was to have no contact with decedent's sister nor was he to have any contact with any other minor children without adult supervision. (Id. at ¶14).

After placed on probation, defendant Koschalk came under the supervision of the Westmoreland County Adult Probation Department, specifically, the three individual defendant probation department employees named as defendants herein. Plaintiff alleges that during the course of his probation, defendant Koschalk continued to make attempts to carry on an unsupervised relationship with decedent's sister. (Id. at ¶ 15).

On May 14, 2001, Probation Officer Tami Whalen personally observed Koschalk, who was with decedent's

sister at the Target Store in Greensburg, in violation of the terms of his probation. (Id. at ¶ 16). On May 16, 2001, Probation Officer Whalen prepared a report documenting the unauthorized contact between Koschalk and decedent's sister. On June 15, 2001, a formal document alleging a parole violation by Koschalk was signed by Probation Officer Yesko for Probation Officer Whalen. On June 18, 2001, Probation Supervisor Guinta signed the same document requesting that a final revocation hearing be scheduled for Koschalk. (Id. at ¶¶ 18-19). On June 27, 2001, a petition to revoke defendant Koschalk's probation was filed through the District Attorney's office. On August 6, 2001, the Westmoreland County Court Administrator's office issued a notice that a hearing on the Petition for Revocation of Koschalk's probation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County, Pennsylvania. However, prior to the scheduled hearing on the petition for revocation of parole, on July 15, 2001, defendant Koschalk shot and killed decedent, Annette Bright. (Id. at ¶¶ 20-22)

Plaintiff alleges that approximately three weeks before decedent Annette Bright's murder, he contacted Officer Carl Franzaglio of the City of Monessen Police Department (who had made the arrest precipitating Koschalk's guilty plea on May 31, 2000) and requested that Officer Franzaglio "take immediate action to incarcerate Koschalk for the protection of his family." (Id. at ¶¶ 26-27). Plaintiff alleges that Officer Franzaglio assured him that immediate action would be taken bout nothing occurred to detain Koschalk prior to the events of July 15, 2001. Plaintiff alleges that one of Koschalk's motives for murdering Annette Bright was to retaliate against plaintiff and his family for efforts they made to prevent him from seeing decedent's

sister following the incident for which Koschalk pled guilty in May of 2000. (Id. at ¶ 28).

Based on these facts, plaintiff alleges that had defendants acted sooner to arrest and incarcerate Koschalk for his probation violations, he would not have had the opportunity to murder the decedent on July 15, 2001. Plaintiff contends that the probation department defendants failed to take timely steps to revoke Koschalk's probation prior to Annette Bright's death. Plaintiff further contends that Officer Franzaglio, and his employer, the City of Monessen, are liable to him as a result of Officer Franzaglio's failure to arrest Koschalk for the alleged probation violation prior to decedent's death. Plaintiff contends that defendants Paul S. Kuntz, the Westmoreland County Court Administrator, and John Peck, the District Attorney, are liable to him because they unreasonably delayed the scheduling of defendant Koschalk's probation revocation hearing. Finally, plaintiff alleges that defendants actions and inactions "served to embolden Koschalk, who despite confrontation, saw no enforcement action." Id. at ¶ 30.

III. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court accepts as true all allegations in plaintiff's complaint and all reasonable inferences that can be drawn therefrom after construing them in the light most favorable to the non-movant. Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). "In determining whether a claim should be dismissed under Rule 12(b)(6), the Court should only look to the fats alleged in the Complaint and its attachments without reference to other parts of the record."

Id. Dismissal is not proper unless "it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiffs' allegations." Id.

The Court is not required to credit or lend credence to "mulled allegations" or "legal conclusions." Morse v. Lower Merion School Dist., 132 F.3d 902, 905 (3d Cir. 1997). In ruling on a Rule 12(b)(6) motion, courts can and should reject "legal conclusions," "unsupported conclusions," "unwarranted references," "unwarranted deductions," "footless conclusions of law," and "sweeping legal conclusions in the form of actual allegations." Id. at 907, n. 8. "Legal conclusions masquerading as factual conclusions will not suffice to circumvent a motion to dismiss." Id. (quoting Fernandez-Montes v. Allied Pilit Assocs., 987 F.2d 278, 284 (5th Cir. 1983)).

IV. ANALYSIS

Plaintiff contends in count I of the amended complaint that defendants (except for defendant Koschalk) are liable for violations of 42 U.S.C. § 1983. It is apparent from the allegations of the amended complaint, and confirmed by plaintiff's brief in opposition to the motions to dismiss, that he is attempting to establish the liability of the moving defendants by contending that their alleged actions and/or inactions created a danger for Annette Bright that she would not otherwise have faced had the moving defendants not acted as alleged. Plaintiff has added allegations in his amended complaint that defendant Koschalk was "emboldened" by defendant's actions and/or inactions in failing to detain him, despite their knowledge of his probation violation, and despite their assurances to plaintiff that such action would be taken promptly. Plaintiff also claims that

defendants established, developed or encouraged the custom, policy and/or procedure of failing to provide adequate training and instruction in the enforcement of probation violations under the circumstances evidence in this case. (doc. no. 48,¶¶ 31 and 35).

According to plaintiff, his "emboldenment" theory and the allegations in support thereof, are sufficient to withstand defendants' motions to dismiss, and therefore, he claims that the moving defendants are liable for the death of Annette Bright under § 1983 based upon the law established by the United States Supreme Court in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989) and its progeny. See Kniepp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996)(Court of Appeals first adopted the theory of state-created danger).

(1) Origins of the state-created danger theory

A state actor generally owes no duty to protect an individual against violence from a third person, since the Supreme Court has determined that the Due Process Clause imposes no duty on a state actor to provide members of the general public with adequate protective services. The Due Process Clause has been interpreted to serve as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195.

In DeShaney, the Supreme Court held that simply because a state actor releases a person he or she had previously taken into custody, the state actor does not, *ipso facto,* owe a continuing duty to protect the person or others

from the person. In that case, county officials removed a child from his home, but later returned him to the custody of his abusive father. The father subsequently beat the child to death. The child's mother then sued the county officials claiming that the child's civil rights were violated by their failure to continue to protect the child and by the release of the child from custody. The Supreme Court rejected the mother's claims, stating:

> That the State once took temporary custody of [the decedent] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Id. at 201.

In the instant case, plaintiff alleges that the moving defendants should have taken the affirmative sep of arresting and/or incarcerating Koschalk for an alleged probation violation before he murdered Annette Bright, and that their failure to do so, combined with the hollow assurances provided to plaintiff that they would take prompt action to incarcerate defendant Koschalk, served to embolden Koschalk (doc. no. 48, amended complaint ¶ 30).

It is well-settled that the fact that the moving defendants had been involved with Koschalk's prior arrest and/or probation does not create any continuing duty on the part of the moving defendants to prevent Koschalk from ever committing any other crime. The crux of the issue, then, is whether defendants' assurances to plaintiff that they would seek to arrest Koschalk, combined with their failure to do so,

is sufficient to make out a claim that the state created this danger.

(2) Elements of the state-created danger theory set forth in Kneipp

In Mark v. Borough and Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) and later in Kniepp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996), the Court of Appeals for the Third Circuit considered and clarified the theory of state-created danger established in DeShaney. In Kneipp, the Court set forth that the state-created danger theory of liability requires plaintiff to establish the following four elements:

1. Whether the harm ultimately caused was foreseeable;

2. Whether the state actors acted in willful disregard for the safety of the plaintiff;

3. Whether some relationship existed between the state and the plaintiff; and

4. Whether the state actors used their authority to create an opportunity for harm that would not otherwise have existed.

Kneipp v. Tedder, 95 F.3d 1199, 1201.

The Courts in this jurisdiction, in analyzing whether a plaintiff's civil rights claim could survive on the basis of the state-created danger theory, have focused their analysis on the

factors set forth in Kneipp. Sanford v. Stiles, 2004 WL 2579738 (E.D. Pa. 2004); Kepner v. Houstoun, 164 F.Supp. 2d 494 (E.D. Pa. 2001); Jones v. City of Philadelphia, 185 F. Supp. 2d 413 (E.D. Pa. 2001).

(3) Recent modifications to the Kniepp test

Under the most modern rendition of the Kniepp test, as recently set forth in Rivas v. City of Passaic, 365 F.3d 181, 194-196 (3d Cir. April 26, 2004)(Ambro., J. concurring), plaintiff must show that:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) the conduct of the state official was "so ill-conceived or malicious that it shocks the conscience" or at least rose to the level of deliberate indifference:
>
> (3) there existed some relationship existed between the state and the plaintiff; and
>
> (4) the state actor used his or her authority to create an opportunity for danger that otherwise would not have existed.

Id. at 196.

The concurrence in Rivas stated that recent and substantial modifications to the Kniepp test have called into question whether that test is still good law. Id. at 202. For example, with regard to element number two, based upon the

Supreme Court decision in County of Sacremento v. Lewis, 523 U.S. 833, 845-47 1998, a state actor will only be liable for conduct that "shocks the conscience"; it is no long enough that he or she acted in "willful disregard" of plaintiff's safety (element two under Kniepp). Id. at 202. As the concurrence in Rivas emphasized, changesin the third and fourth prongs of the Kniepp test have expanded the state-created danger doctrine, while the substitution of "shocks the conscience" language for "willful disregard" in the second prong have limited the state-created danger doctrine.[3]

In Leidy v. Borough of Glenolden, 277 F.Supp. 2d 547 (E.D. Pa. 2003), a decision which was recently affirmed by the Court of Appeals in an unpublished opinion, 2004 WL 2677158 (3d Cir. November 24, 2004), the District Court analyzed the Kniepp factors in a case with factual similarities to the present situation. In that case, Gerald Bennett served 11 ½ months in prison for indecent assault and simple assault before being released on parole in March of 1999. As a condition of his parole, Bennett was required to participate in sex offender treatment classes. A bench warrant was issued when Bennett failed to participate in the program. Bennett subsequently appeared at the Glenolden Borough Police Station to surrender himself on the bench warrant. Although a dispatcher advised a Glenolden Borough police officer that the bench warrant existed, a hard copy of the

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[3] For example, with regard to the third prong, in Morse v. Lower Merion School District, 132 F.3d 902 (3d Cir. 1997), the Court suggested that there may be a "relationship" between the state and plaintiff simply because plaintiff was a foreseeable victim, either individually or as a member of a discrete class. Id. at 914.

warrant could not be located. As a result, the police advised Bennett that he was being released and suggested that the turn himself in the following day to the Probation Officer. Bennett subsequently left the police station without having been asked for his address which was required for the standard police incident report. Minutes after Bennett left the police station, the Glenolden Borough Police Department was advised that the hard copy of the warrant had been located. Although the Glenolden police officer who had been dealing with Bennett immediately went out to search for Bennett, he was unable to locate him. Six days later, Bennett fatally strangled Roxanne Leidy and raped her thirteen-year-old daughter. Leidy and her daughter lived in a nearby apartment building and Bennett resided with them.

The District Court in Leidy granted the defendants' motion for summary judgment holding, *inter alia,* that the defendants could not be held liable under the state-created danger doctrine because none of the defendants acted to create or increase the danger imposed by Bennett, the parolee, nor were his female victims any more foreseeable as victims than the female public at large. The District Court in Leidy based its extensive analysis primarily upon DeShaney and Kniepp.

In affirming the District Court's grant of summary judgment, the Court of Appeals focused its analysis on the fourth element of the state-created danger analysis because it was the "fundamental reason" the District Court rejected plaintiff's civil rights claim. Leidy, 2004 WL 2677158 at *3.

(3) Application

This Court has serious doubts that plaintiff can establish: (1) that the harm caused was "foreseeable" and

"fairly direct" (element one); (2) that the state actors conduct "shocks the conscience" (element two); or (3) that there existed some relationship between the state and plaintiff (element three), as required by the recent modifications to the Kniepp test set forth in Rivas, supra.[4] However, the Court will not address elements one, two and three, because, much like the District Court in Leidy, we find that the "fundamental reason" that plaintiff's claim must fail is because "the state actors did not use their authority to create an opportunity for harm that would not otherwise have existed." Leidy, 2004 WL 2677158 at *3 (citing Leidy, 277 F.Supp. 2d 547 (E.D. Pa. 2003)).

Plaintiff argues that the moving defendants' failure to arrest and/or incarcerate Koschalk for violating his probation prior to the murder "emboldened" Koschalk by making him believe that no action would be taken against him. This conclusion would require this Court to infer that plaintiff has read Koschalk's mind. This is not a reasonable inference.

Furthermore, our research has revealed that plaintiff's theory of "emboldenment" has not been accepted by any other court in this jurisdiction. Plaintiff argues that the Court of Appeals in Leidy v. Borough of Glenolden, 2004 WL 2677158 (3d Cir. November 24, 2004), "specifically recognized the potential validity of the emboldenment theory," when it stated:

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[4] The Court recognizes that the recent modifications to the Kniepp test have potentially broadened the state-created danger doctrine. Nonetheless, we note that plaintiff was not a foreseeable victim either individually or as a member of a discrete class. The only foreseeable victim, if there was one, would have been decedent's sister. Furthermore, plaintiff, as a minor, was not part of a discrete class of persons.

> The plaintiffs contend that the Glenolden Defendants did not simply fail to protect the Leidys; rather, they assert that the "something more" was that the defendants' failure to arrest Bennett placed the victims in harm's way by emboldening Bennett to commit these extreme acts of violence. The plaintiffs further hypothesize that the warrant itself "placed stressful influences on Bennett," and that his "narrow [] escape" from police after the warrant's issuance may have led Bennett "to believe that he could thumb his nose at the Courts, Probation Office, and society thus making Bennett's heinous crimes more likely.
>
> The plaintiffs' implausible conjecture, so far removed from the evidence, could not lead a factfinder to reasonable conclude that the defendants' conduct "placed the plaintiff in a dangerous position that was foreseeable."

Leidy, 2004 WL 2677158 at *4.

We decline plaintiff's invitation to find that the above-cited language evidences a decision by the Court of Appeals to accept an "emboldenment" theory to establish a state created danger. Plaintiff is attempting to assert that the defendants' combination of action an inaction sufficiently "emboldened" defendant Koschalk. However, these assertions do not accomplish plaintiff's goal because regardless of whether the state actions are characterized as affirmative acts or omissions, the necessary inquiry remains, "whether the state in some way placed the plaintiff in a

dangerous position that was foreseeable." Leidy, 2004 WL 2677158 at*3 (citing Morse, 132 F.3d at 915).

The fact remains that the moving defendants were acting to revoke Koschalk's probation, even if it was not at a pace that plaintiff suggests was proper. In the instant case, the state actors are not alleged to have placed Annette Bright into Koschalk's custody or to have interfered with the enforcement of an order pertaining to Annette Bright. The moving defendants' alleged failure to arrest Koschalk on his probation violation in a more expeditious manner did not create an opportunity for Koschalk to kill Annett Bright that would not have existed but for their exercise of authority, nor did they place plaintiff in a dangerous position that was foreseeable.

Defendants City of Monessen and Franzaglio have presented authority and case law which demonstrate that the officer did not have the authority to arrest Koschalk for a probation violation. The case law cited by Defendants Franzaglio and the City of Monessen indicates that a municipal police officer in Pennsylvania does not have the authority to make a warrantless arrest of a suspected probation violator unless the probation officer requests the officer to make the arrest. Commonwealth v. Pincavitch, 214 A.2d 280 (Pa. Super. 1965). and Commonwealth v. Lyon, 555 A.2d 920 (Pa. Super. 1989). Plaintiff's amended complaint neither avers nor implies that Officer Franzaglio was requested by a probation officer to arrest Koschalk. As a result, plaintiff is unable to show the Defendants Franzaglio or the City of Monessen could have acted to create a danger that did not already exist.

The allegations in plaintiff's amended complaint,

even when construed in a light most favorable to plaintiff as the non-moving party, fail to show that the moving defendants' actions and/or omissions neither created the danger that defendant Koschalk would commit a crime against Annette Bright that did not otherwise exist, nor did they place plaintiff in a dangerous position that was foreseeable. Nothing that the moving defendants did or did not do placed Annette Bright in **more** danger than she would have faced had the defendants never been involved with Koschalk's probation violations. Annette Bright had no constitutional right to be protected from the criminal acts of third persons and, therefore, was not deprived of a constitutional right by any of the moving defendants. See DeShaney, 489 U.S. 189, 109 S.Ct. 998 (1989). For these reasons, plaintiff's Section 1983 claims against the moving defendants must be dismissed.

B. Plaintiff's Wrongful Death and Survival Actions Fail as a Matter of Law.

Plaintiff also states pendent causes of action against the moving defendants for Wrongful Death and Survival. (Plaintiff's amended complaint, counts II and III). Plaitniff's claims against Westmoreland County and the City of Monessen are barred by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S. §8541 et seq. ("P.S.T.C.A.") The P.S.T.C.A. only waives municipal immunity as to negligence claims based upon eight narrow exceptions found in 42 Pa.C.S. §8542(b)(1)-(8). Plaintiff's claims do not fall in any of the exceptions and are, thus, barred.

Plaintiff's state law claims against the individual moving defendants are also barred by the P.S.T.C.A. The

plaintiffs in Leidy made state law claims in addition to their DeShaney claim. The District Court in Leidy granted summary judgment as to the state law claims brought against the Borough's employees based upon the P.S.T.C.A. The plaintiffs, in Leidy, alleged that the individual officers were liable for negligent infliction of emotional distress. The District Court found that the plaintiff's allegations could not support a finding that the individual defendants "intended to violate the law or bring about the harm that resulted to the plaintiffs." Leidy, 277 F. Supp. 2d at 568. As a result, the District Court found that the provisions of the P.S.T.C.A., 42 Pa.C.S. §§8541-42, 8545, and 8550, barred the plaintiffs' claims. In the instant case the result is identical.

Any negligence claim against the moving defendants must meet an exception to the immunity provided in the P.S.T.C.A. This Court finds no such exception applicable as to Westmoreland County and/or the City of Monessen. Similarly, as the District Court in Leidy found, the individual moving defendants have not been alleged to have knowingly violated a law, intended to cause harm to Annette Bright, or engaged in any "willful misconduct". 42 Pa.C.S. §8550. As a result, plaintiff's claims are barred by the provisions of the P.S.T.C.A.

The Pennsylvania Wrongful Death and Survival Act, 42 Pa.C.S. §§ 8301 and 8302 were enacted to allow the survival of viable causes of action for bodily injury to a deceased, beyond the life of the victim. (See generally Baumgart v. Keene Building Products Corp., 633 A.2d 1189 (Pa. Super. 1993)). The Wrongful Death and Survival Act did not create a new theory of liability but merely allowed a tort claim of the decedent to be prosecuted. As a result, plaintiff in the instant case must state all the elements of a

valid tort theory and such theory is subject to the defenses to that theory. Thus, if the underlying tort theory is barred by immunity, then the wrongful death or survival claim will fail. Because we have found that municipal immunity applies, plaintiff's wrongful death and survival claims must be dismissed for failing to state a claim.

C. Plaintiff's Remaining State Law Claims Against Defendant Koschalk Must be Dismissed for Lack of Jurisdiction.

The only claims yet to be disposed of in the case are a survivorship action and assault and battery claims against defendant Koschalk (part of Count III and Count IV). Plaintiff brings both of these state claims, requesting that this Court exercise pendent jurisdiction over the matters. However, absent extraordinary circumstances where the federal causes of action are dismissed the district court should "ordinarily refrain from exercising pendent jurisdiction [over state law claims]." Rolo v. City Investing Co. Liquidating Trust, 845 F.Supp. 182, 215 (D.N.J.1993), aff'd 43F.3d 1462 (3d Cir. 1994) (citations omitted). See also Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995)("where the claim over which the District Court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so."); Angst v. Mack Truck, Inc.. 969 F.2d 1530 (3d Cir. 1992) (once all federal claims have been dropped from the case, the case should be dismissed or transferred to the appropriate Pennsylvania Court of Common Pleas pursuant to 42 Pa.C.S. § 5103(b)),

There are no "extraordinary circumstances" which warrant the exercise of jurisdiction over the state claims, and this Court declines to exercise supplemental jurisdiction over the survivorship and assault and battery claims against defendant Koschalk. Plaintiffs may attempt to pursue these claims in state court pursuant to 42 Pa.C.S. § 5103(b). See Williams v. F.L. Smithe Mach. Co., 395 Pa. Super. 511, 577 A.2d 907 (1990).

An appropriate order follows.

Arthur J. Schwab
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Case No. 03-1072
Judge Arthur J. Schwab

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Plaintiff,

v.

WESTMORELAND COUNTY; TAMI WHALEN, Individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

ORDER OF COURT

And now, this 25th day of February, 2005, for the reasons set forth in the accompanying memorandum opinion, defendants' renewed motions to dismiss and supplements thereto (doc. nos. 40, 49, 50, 52) are HEREBY GRANTED

The Clerk shall thereby mark the docket as CLOSED.

Arthur J. Schwab
United States District Judge

cc: All counsel of record

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,	:	
	:	
v.	:	No. 03-1072
	:	Judge Schwab
WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Please; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,	:	

FIRST AMENDED COMPLAINT

AND NOW comes Plaintiff John Bright, Administrator of the Estate of Annette Bright, by and through his Counsel, Peter M. Suwak, Esquire, who files the

following Complaint, based upon the following:

INTRODUCTION

1. Plaintiff John Bright is an adult individual with his residence at 912 Somerset Street, Monessen PA 15062. John Bright is the natural father of Annette Bright and is the Administrator of the Estate of Annette Bright, deceased.

2. Defendant Westmoreland County is a duly organized Third Class county in the Commonwealth of Pennsylvania with offices at N. Main Street, Greensburg PA 15601

3. Defendant Tami Whalen is an adult individual who is a Probation Officer for the Westmoreland County Probation Office which has an office in the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

4. Defendant Richard Yesko is an adult individual who is a Probation Officer for the Westmoreland County Probation Office which has an office in the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

5. Defendant Anthony C. Guinta is an adult individual who is a Probation Supervisor for the Westmoreland County Probation Office which has an office in the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

6. Defendant City of Monessen is a duly organized municipal body with offices at 100 3rd Street, Monessen PA 15062.

7. Defendant Carl Franzaglio is a police officer for the Police Department of the City of Monessen with offices at 100 3rd Street, Monessen PA 15062.

8. Defendant Paul S. Kuntz is the Court Administrator for the Court of Common Pleas of Westmoreland County with offices at the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

9. Defendant John Peck is the District Attorney of Westmoreland County with offices at the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

10. Defendant Charles Koschalk is an adult individual presently incarcerated with the Commonwealth of Pennsylvania prison system.

STATEMENT OF FACTS

11. On or about March 4, 2000, Defendant Charles Koschalk, approximately 34 years of age, kept a twelve year old female overnight in his truck in the woods without the child's parents' knowledge of her whereabouts.

12. On or about May 31, 2000 Defendant Kolschalk entered a guilty plea to corrupting the morals of a minor and was placed upon twenty-three months probation, with credit for time served. The effective end of the probation was scheduled for April 30, 2002.

13. The defendant Koschalk was placed under the supervision of the Westmoreland County Adult Probation Department which included the three individual defendant probation officers.

14. A specific condition of probation was that Defendant Koschalk was to have no direct or indirect contact with the twelve year old victim of the corrupting minors charge and/or any minor children (without adult supervision).

15. Despite this condition of probation, Defendant Koschalk continued to make attempts to carry on an unsupervised relationship with the twelve year old victim.

16. On or about May 4, 2001, at 20:09 hrs, Defendant Probation Officer Tami Whelan personally observed and confronted Defendant Koschalk with the twelve year old victim, unsupervised, at the Target Store in Greensburg. The probation officer considered this a direct violation of the Court Order.

17. Defendant Probation Officer Whelan prepared a report in support of a violation petition on or about May 16, 2001.

18. On or about June 15, 2001, a formal violation document alleging the above unauthorized contact was signed by Probation Officer Richard Yesko for Probation Officer Whelan.

19. On or about June 18, 2001, Probation Supervisor Anthony C. Guinta signed the violation document requesting that a final revocation hearing be scheduled for Defendant Koschalk.

20. On or about June 27, 2001, a Petition to Revoke Defendant Koschalk's probation was filed through Defendant District Attorney's office by and through an assistant district attorney.

21. On ~~or~~ about August 6, 2001, the Westmoreland County Court Administrator's Office issued a notice that a hearing on the Petition for Revocation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County.

22. On or about July 15, 2001, eight year old Annette Bright was shot and killed by means of a shotgun wound to the head.

23. Eight year old Annette Bright had a family relationship with the twelve year old victim of the aforementioned corrupting a minor charge.

24. On or about January, 2003, Defendant Koschalk entered a plea of guilty to the charge of first degree murder in the homicide of Annette Bright. He has been sentenced to life in prison without parole and is currently incarcerated.

25. A period of approximately ten weeks expired from the date on which the Probation Officer observed the direct violation of the Court Order and the time when the victim's relative, also a minor, was shot and killed. During this time, there was no arrest, detention, or service of papers upon Defendant Koschalk. This inexplicable delay was the responsbility of the processing system as administered by Defendants Probation Officers, Court Administrator, District Attorney and/or their staffs or personnel.

26. Approximately three weeks before the murder of Annette Bright, John Bright, related to the minors, contacted Officer Carl Franzaglio of the City of Monessen Police Department. Officer Franzaglio had been the prosecuting officer in the initial corruption of minors charge against

Defendant Koschalk.

27. Mr. Bright, aware that the probation officer had confronted Koschalk violating his probation by continued contact with the twelve year old victim, requested Officer Franzaglio to take immediate action to incarcerate Koschalk for the protection of his family. Defendant Officer Franzaglio assured Bright that immediate action would be taken. However, nothing occurred to detain Koschalk prior to the murder on July 15, 2001.

28. Koschalk murdered Annette Bright, in part, in retaliation for efforts made by the family to prevent him from seeing the twelve year old relative/victim of the corrupting minors charge.

COUNT I - CIVIL RIGHTS VIOLATIONS
(v. all Defendants except Koschalk)

29. The averments of paragraphs 1 through 28 above are here incorporated as though fully set forth at length.

30. As set out above, the actions of the Defendants, individually and/or jointly, created a state-created danger and/or otherwise violated the established special relationship between the government defendants and victim of the homicide resulting in legal harm to Annette Bright and her family. More particularly:

a. An express condition of probation was for Koschalk to have no unsupervised contact with the twelve year old victim of the corrupting morals charge and/or other minors.

b. The assigned probation officer had direct knowledge that a violation of that condition had occurred on or about May 4, 2001 and specifically confronted Koschalk regarding it.

c. Despite this confrontation, Koschalk was not detained, arrested, or even notified of a revocation process until several weeks after the homicide.

d. A family member of Annette Bright, fearing harm to the family, specifically requested an arrest to the prosecuting officer and received assurances that such action would be taken immediately.

e. These affirmative actions of the Defendants served to embolden Koschalk, who despite confrontation, saw no enforcement action. Additionally, assurances of action encouraged the family's reliance upon the authorities.

f. (1) The petition to revoke probation contains the following averments by Tammy Whalen:

> On May 4, 2001, at 20:09 this officer witnessed and confronted the defendant with the victim at the Target store in Greensburg. This is a direct violation of the court order. (emphasis added).

(2) Kolschalk had been charged with corrupting the morals of Marcy Bright (Annette's sister), for the act of keeping the child overnight in a truck in the woods without her parents' knowledge of her whereabouts. Koschalk had picked her up on March 4, 2000, without parental permission; took her shopping and kept her overnight in his pick-up.

(3) Koschalk had written letters addressed to "Nut", his nickname for Marcy. In part, one letter provided, as follows:

> "Feel real bad, like you really hate my guts. You don't understand, when I swear I will kill you, I mean that. You may tell your Mom and Dad or the police. By the time the cops knock on my door, I will be gone and you would better hope they catch me before I kill you and your family. I just will lose it, Nut, because I love you and will not let you go because we made plans to do things together."

(4) As noted above, the confrontation and failure of follow up, emboldened and/or encouraged Koschalk eventually to act on his misplaced emotional/psychological state. From his own correspondence his willingness to kill members of the Bright family would be encouraged when confronted with ineffective law enforcement responses, as occurred here.

(5) Such other matters as revealed by discovery.

g. Approximately three weeks before the homicide,

(1) John Bright went to the Monessen Police station and spoke directly to Officer Franzaglio. Bright asked Franzaglio why Koschalk wasn't in jail. Franzaglio said he didn't know, as certainly Bright or Franzaglio would be in jail under similar circumstances. Franzaglio said he was going to District Attorney Peck for a warrant for his arrest.

(2) In reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his

family, hence creating the opportunity for the damages ultimately sustained.

h. The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations, which violations created and/or should have created immediate concern for the safety of the affected minors constituted a state-created danger and/or violation of a special relationship and/or other duty owed to the victim and her family.

31. The homicide was directly and proximately caused by the affirmative acts and/or the deliberate indifference and/or failure to enforce, despite actual knowledge, the court-ordered conditions of probation. Further, the effect of direct confrontation with Koschalk, coupled with the aforementioned inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family.

32. The actions of the Defendants (other than Defendant Koschalk), acting individually and/or in concert and/or otherwise jointly, deprived Annette Bright and her family of their civil rights including, but not limited to, the following:

a. Right to due process of law and/or otherwise entitlement to be free from state-created dangers and/or non-protection in violation of legally recognized special relationships;

b. Such other violations as revealed through

discovery and/or further development of the case.

33. The aforementioned Defendants lack immunity under the circumstances of this case since the aforementioned acts violate federal law and/or otherwise constitute administrative, clerical, and/or investigative conduct.

34. These actions have served to deprive plaintiffs of their civil rights, as previously outlined, under color of law and hence violate the United States Constitution and are actionable under 42 U.S.C. §1983.

35. Defendants Westmoreland County, Court Administrator, the City of Monessen and individual defendant officers have established, developed, ratified, approved or otherwise encouraged by and through its agents and/or employees, the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedures, including the following:

a. Defendant City of Monessen has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediate arrest procedures and/or prompt processing of revocation petitions under circumstances evident in this case.

b. Defendant City encouraged the instant conduct by failing to take any disciplinary action whatsoever despite notice. As a result of these failures, Defendant City has failed to protect the public, including Plaintiffs, as outlined.

c. Defendant City fully ratified the conduct of police officers.

d. Westmoreland County and its policymakers including Defendant Court Administrator, has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediate arrest procedures, and/or prompt processing of revocation petitions under circumstances evident in this case.

36. As a result of the aforementioned, plaintiffs have been damaged as follows:

a. Funeral and other expenses cognizable under the law;

b. Lifetime loss of earnings, earning power, and/or capacity of decedent victim;

c. Pain, suffering, emotional distress, and/or terror of decedent prior to her death;

d. Parental/family pain, suffering and emotional loss;

e. Declaration of violation of rights;

f. Punitive damages;

g. Counsel fees and costs under 42 U.S.C. §1988.

WHEREFORE, Plaintiffs demand judgment against the Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT II - WRONGFUL DEATH
(v. all Defendants)

37. The averments of Paragraphs 1 through 36 are hereby incorporated as though fully set forth at length.

38. The facts previously outlined constitute the state tort of wrongful death. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

39. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 36.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT III - SURVIVORSHIP ACTION
(Plaintiff v. all Defendants)

40. The averments of Paragraphs 1 through 39 are hereby incorporated as though fully set forth at length.

41. The facts previously outlined constitute a survivorship action under state law. prosecution. The Court is requested to accept jurisdiction pursuant to the exercise of

PENDENT JURISDICTION.

42. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 36.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT IV - ASSAULT AND BATTERY
(v. Defendant Koschalk)

43. The averments of Paragraphs 1 through 42 are hereby incorporated as though fully set forth at length.

44. The facts previously outlined constitute the state tort of assault and battery resulting in death. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

45. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 36.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

Respectfully submitted,

Date: February 4, 2005

By: s/Peter M. Suwak
Peter M. Suwak, Esquire
PA I.D. #23779

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing First Amended Complaint was served by First Class Mail, postage prepaid, upon the following:

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(3)

No. 06-563

FILED
JAN 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JOHN BRIGHT, Individually and in his capacity as Administrator of the Estate of Annette Bright, deceased,
Petitioner,

v.

WESTMORELAND COUNTY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Whether the Third Circuit Court of Appeals appropriately applied the stated rule of law upon which Petitioner's claims are based, and therefore, no compelling reasons exist for this Petition to be granted?

II. Whether the Petition for a Writ of Certiorari should be denied where the Third Circuit Court of Appeals affirmed the dismissal of Petitioner's First Amended Complaint, which fails to meet any of the requirements of the state-created danger exception and seeks to rewrite the Fourteenth Amendment through a tortured application of consistent precedent?

III. Whether the Petition for a Writ of Certiorari relative to the Third Circuit Court of Appeals' dismissal of the Petitioner's state law claims must be denied where no compelling reasons exist for this Court's consideration?

PARTIES TO THE PROCEEDING

The Petitioner is JOHN BRIGHT, individually and in his capacity as Administrator of the Estate of Annette Bright, deceased.

The Respondents are WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as Probation Officer for Westmoreland County; ANTHONY C. GIUNTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSON; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monesson; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK.

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INTRODUCTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *See* United States Supreme Court Rule 10. A petition for a writ of certiorari will be granted only for compelling reasons. Id. Petitioner fails to offer any compelling reason why this Court should grant this petition.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Id. At bottom, Petitioner seeks review in this Court of factual issues which Petitioner contends satisfy requirements of the state-created danger theory of liability. Petitioner fails to offer any compelling reason why the Court should grant review in this case.

In light of the aforementioned, and as more fully set forth below, the Court should deny Petitioner's Petition for a Writ of Certiorari in its entirety.

ARGUMENT

I. THE THIRD CIRCUIT COURT OF APPEALS APPROPRIATELY APPLIED THE STATED RULE OF LAW UPON WHICH PETITIONER'S CLAIMS ARE BASED, AND THEREFORE, NO COMPELLING REASONS EXIST FOR THIS PETITION TO BE GRANTED.

Petitioner's Petition for a Writ of Certiorari fails to assert any compelling reasons for this Court to exercise its discretionary jurisdiction over this matter. United States Supreme Court Rule 10 provides guidance as to the character of the reasons the Court considers, stating, in relevant part,

that the following are indicative of matters which may warrant review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ...
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Supreme Court Rule 10.

Petitioner's request for a Writ of Certiorari does not satisfy any of the examples given in Rule 10, nor does it proffer any other legitimate issues requiring this Court's discretionary jurisdiction.

The Third Circuit Court of Appeals has properly stated and applied the precedent established by this Court in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). In that case, this Honorable Court settled the narrow grounds upon which the state may be liable to individuals under the substantive component of the Fourteenth Amendment's Due Process Clause. Nothing contained in the Third Circuit's application of this precedent, nor any other

circuit's application of it, has conflicted with the general premise that the substantive Due Process Clause of the Fourteenth Amendment is clearly and unequivocally designed to protect individuals from improper government action, but does not guarantee those same individuals protection against private acts of violence. In fact, the Third Circuit's opinion cites DeShaney throughout, and while addressing other similar cases within the circuit, the Court of Appeals observed as follows:

> Our case law establishes the following essential elements of a meritorious "state-created danger" claim:
>
> (1) "the harm ultimately caused was foreseeable and fairly direct;"
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

(Pet. Apx. 12A)(footnotes omitted). See also, Townsley v. West Brandywine Tp., 2006 WL 1147267, at *6 (E.D.Pa. Apr. 26, 2006).

It is important to note that the Third Circuit's opinion in this matter specifically addressed the claim by Petitioner on reconsideration via identical issues argued in this Petition, and held that any perceived inconsistencies within its decisions were controlled by the teachings of DeShaney. In this regard, the Third Circuit Court declared:

> While acknowledging that the line between action and inaction is sometimes difficult to draw, we there affirmed what DeShaney clearly teaches: the Due Process Clause proscribes only state action and, accordingly, liability "under the state-created danger theory [can only] be predicated upon the state's affirmative acts which work to plaintiffs' detriment in terms of exposure to danger."

(Pet. Apx. 14A)(citing D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364, 1374 (3d Cir. 1992)(en banc), cert. denied, 506 U.S. 1079 (1993)).

The Third Circuit further acknowledged that it *never* found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was affirmatively exercised. It continued:

> Contrary to Bright's suggestion, Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996), and Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997), do not indicate otherwise. In Kneipp, the police stopped a couple on the street in the middle of the night for causing a disturbance. The wife was intoxicated to the

> point of being unable to walk without assistance. While the police initially detained both of them, they subsequently gave the husband permission to go home. He departed, assuming that the police were going to take her either to the hospital or the police station. At some point after his departure, the police sent the wife home alone, resulting in her fall to the bottom of an embankment and serious injury. We affirmed, finding that there was "sufficient evidence in the summary judgment record to show that ... the police officers used their authority as police officers to create a dangerous situation or to make [the wife] more vulnerable to danger [than] had they not intervened. ... As a result of the affirmative acts of the police officers, the danger or risk of injury to [the wife] was greatly increased. Kneipp, 95 F.3d at 1209.
>
> In Morse, we characterized the issue raised under the fourth element of a state-created danger claim as whether "the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.'" Morse, 132 F.2d at 915 (quoting from Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995)). We affirmed the District Court's dismissal of the complaint, however, based on plaintiff's failure to satisfy the first element of a state-created danger claim, *i.e.*, on the facts alleged, the third parties' "deadly attack was not a foreseeable and fairly direct result of defendants' behavior." Id. at 915-16.

(Pet. Apx. 15A-16A).

The court appropriately closed its discussion by stating the following:

> We conclude that the state cannot "create danger" giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.

(Pet. Apx. 18A). This application of law and inevitable conclusion are not only consistent with the mandate of this Honorable Court, but also with the other circuits, and no adequate grounds exist for this Court to accept certiorari.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WHERE THE THIRD CIRCUIT COURT OF APPEALS AFFIRMED THE DISMISSAL OF PETITIONER'S FIRST AMENDED COMPLAINT, WHICH FAILS TO MEET ANY OF THE REQUIREMENTS OF THE STATE-CREATED DANGER EXCEPTION AND SEEKS TO REWRITE THE FOURTEENTH AMENDMENT THROUGH A TORTURED APPLICATION OF CONSISTENT PRECEDENT.

Dissatisfied with the Third Circuit Court of Appeals' decision affirming the dismissal of his First Amended Complaint, and in a transparent effort to obtain a more favorable result in his own case, Petitioner apparently seeks to persuade this Honorable Court that its prior holding in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), was ambiguous and/or is being inconsistently applied by the Third Circuit. In fact, Petitioner promotes a more expansive view of the protections afforded by the substantive component of the Due Process Clause by fashioning what he describes as an "emboldenment" theory,

while citing no legitimate precedent to support his request. Certainly, no precedent from the Third Circuit Court - which has consistently applied DeShaney - merits review. Petitioner's efforts are misguided, misplaced, and his Petition should be denied.

The decision of the Third Circuit Court of Appeals was entirely consistent with the rule of law articulated by this Court in DeShaney; specifically, that a state actor's mere awareness of a danger, even when coupled with "expressions of intent to help" the ultimate victim, does not give rise to an affirmative duty to protect under the Due Process Clause. Id. at 189-90, 200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf"). Indeed, Petitioner's allegations against the Westmoreland County Respondents, while strikingly similar to those made by the plaintiff in DeShaney, are even more tenuous.

In DeShaney, the plaintiff brought a civil rights action against social workers and local officials who had received complaints that her child was being abused by his father, but failed to permanently remove the child from his father's custody. Id. at 191-92. The Complaint alleged that the child was deprived of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, because the State actors failed to intervene to protect the child against a risk of violence at his father's hands of which they knew or should have known. Id. at 193. The father eventually beat the boy so severely that he suffered brain damage and was expected to spend the remainder of his life confined to an institution for the profoundly retarded. Id. at 193. Thus, in DeShaney, the state actors were not only aware

of the specific type of danger presented - physical harm - but also of the specific victim, Joshua DeShaney. Still, there was no affirmative constitutional duty to protect. See also, Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir. 1995)("The cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury"), cert. denied, 516 U.S. 858 (1995).

Even under the most stringent standards of a Rule 12(b)(6) Motion to Dismiss, Petitioner's First Amended Complaint against the Westmoreland County Respondents, individually and collectively, fails to allege a substantive Due Process claim. There are no allegations in Petitioner's First Amended Complaint which would establish that the Westmoreland County Respondents "created" a danger which did not otherwise exist. DeShaney, 489 U.S. at 201. There are also no allegations that the County had any knowledge of a specific danger to Annette Bright at the hands of Charles Koschalk, nor could there be. Koschalk's prior conviction was for corrupting the morals of a minor, not Annette Bright, and there was never a suggestion that his behavior could turn violent. Moreover, at the time of her murder, Annette Bright was in the custody of her parents. It cannot be inferred merely from the County's knowledge of Koschalk's probation violation - which involved another minor (decedent's sister) - that the County was or could have been aware of any danger posed to Annette.[1] As further noted by the Honorable United States District Judge Arthur J. Schwab, to conclude that the

---

[1] There are also no allegations that the County was aware of the alleged letter to the victim's sister in which Koschalk allegedly expressed his criminal intent. (Pet. 20).

Respondents' failure to arrest and/or incarcerate Koschalk "emboldened" him to commit murder would require a mind-reading inference which is simply unreasonable. (Pet. Apx. 55A).

Even allowing this factual liberty by Petitioner, it is of no advent in these proceedings. Since even an awareness of danger to a particular victim imposes no constitutional duty to protect, Respondents' lack of awareness of any potential for harm to Annette Bright removes this case even further from the ambit of protections afforded by the Due Process Clause. The Third Circuit appropriately held: "A use of authority that creates an opportunity for harm necessarily entails an affirmative act. But an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff." (Pet. Apx. 16A). See also, DeShaney, 489 U.S. at 200 ("In the substantive due process analysis, it is the State's *affirmative act* of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protections of the Due Process Clause, *not its failure to act to protect his liberty interests against harms inflicted by other means*")(emphasis added).

In essence, Petitioner alleges that had the Westmoreland County Respondents more quickly processed Koschalk's parole revocation, he would not have had the opportunity to commit the heinous crime upon the minor child, Annette Bright. (Pet. Apx. 68A, ¶ 25; 72A, ¶¶ 30.h.-31). While in hindsight the crime may have been averted had Koschalk been incarcerated instead of at large, this alone does not give rise to a constitutional violation. Importantly, as this Court previously instructed: "[N]othing in the language of the Due

Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," since the purpose of the Clause is to "protect people from the State, not to ensure that the State protected them from each other." Id. at 195-96. The Third Circuit likewise recognized: "It is *misuse* of state authority, rather than a *failure* to use it, that can violate the Due Process Clause." (Pet. Apx. 13A)(emphasis added). Townsley, 2006 WL 1147267, at *7. By arguing to the contrary, Petitioner seeks to dismantle the clear and unambiguous precedent set forth by this Court in DeShaney and uniformly followed by the Third Circuit, namely, that "the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." DeShaney, 489 U.S. at 196-97.

Petitioner's brief is a tortured analysis of occurrences which do not under any reasonable interpretation untangle to fit within the parameters of an idea which was first outlined by this Court in dicta in DeShaney, 489 U.S. at 201, and was subsequently coined by DeShaney's progeny as the "state-created danger" theory. (Pet. Apx. 11A-13A). Moreover, since the granting of certiorari would not affect the ultimate finding that no constitutional violations occurred in this case, any decision rendered by this Court would be moot.

It is also relevant to note that Judge D. Brooks Smith of the Third Circuit Court indicated that the dismissal of Petitioner's First Amended Complaint was proper based not only upon the fourth prong of the state-created danger test, but also due to Bright's failure to plead facts sufficient to satisfy the first prong. (Pet. Apx. 17A, n. 8). In his view, the harm ultimately caused was not a "foreseeable and a fairly direct result of the state's actions." (Pet. Apx. 17A, n. 8). Consistent with the Westmoreland County Respondents' Brief in Support of Motion to Dismiss, Judge Smith agreed that the

crime of corrupting the morals of a minor is different in degree and kind from the crime of murder, and that, without more, a state actor could not foresee that "failing to detain a pedophile will result in homicide." (Pet. Apx. 17A, n. 8).

The foreseeability issue becomes even more diluted when consideration is given to the fact that the victim, Annette Bright, was not the child with whom the criminal actor (Koschalk) was involved. It is uncontested that the Westmoreland County Respondents never had any contact of any kind involving Annette Bright. Petitioner's claim that the crime against Annette Bright, committed some ten weeks after Koschalk was observed in public with another minor, somehow creates facts requiring an expansion of the state-created danger exception is, in a word, incomprehensible. In each case in which a state-created danger was alleged, including those cited by Petitioner, a fairly immediate, prompt, and foreseeable outcome to a discrete victim occurred as a result of the state actor's conduct. Here, however, the criminal act was too remote a consequence from the initial encounter, and the causal connection too attenuated to impose liability. See DeShaney, 489 U.S. at 197, n. 4 (citing Martinez v. State of Cal., 444 U.S. 277, 285 (1980), reh'g denied, 445 U.S. 920 (1980)). Contrary to Petitioner's assertions, and even assuming, arguendo, that an affirmative act existed, the lapse of over ten weeks time only suggests that the state's conduct did *not* place the victim in any worse condition, and in any event, clearly the conduct, taken as a whole, was not so culpable as to "shock the conscience." (Pet. Apx. 12A). See, Townsley, 2006 WL 114267, at *7, n. 5.

Both the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit were entirely correct in their

application of precedent to the facts of this case. The Third Circuit Court appropriately and concisely addressed the facts presented, holding:

> We conclude that the state cannot "create danger" giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.

(Pet. Apx. 18A).

Petitioner's argument essentially asks this Honorable Court to ignore the clear language of DeShaney and to rewrite the substantive Due Process Clause of the Fourteenth Amendment by forcing the State to act when its underlying tenet is to serve as a limitation on the State's power to act. DeShaney, 489 U.S. at 195. With respect to Petitioner's "emboldenment" theory, the courts below correctly declined to accept this novel theory, finding it would be an improper and unnecessary expansion of this Court's stated rule of law in DeShaney. As the Honorable Judge Schwab aptly stated:

> Nothing that the moving defendants did or did not do placed Annette Bright in **more** danger than she would have faced had the defendants never been involved with Koschalk's probation violations. Annette Bright had no constitutional right to be protected from the criminal acts of third persons and, therefore, was not deprived of a constitutional right by any of the moving defendants. See DeShaney, 489 U.S. 189, 109 S.Ct. 998 (1989).

(Pet. Apx. 58A)(emphasis in original).

Were this Court to accept Petitioner's argument, the State would necessarily become a permanent guarantor of the safety of all persons so long as some thread exists to connect a class of potential victims to the State. This was not the intention of the Due Process Clause, which this Court made abundantly clear in its DeShaney opinion. Moreover, this Court has often noted its "continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law,'" Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 125 S.Ct. 2796, 2810 (2005)(citing Parratt v. Taylor, 451 U.S. 527, 544 (1981)(quoting Paul v. Davis, 424 U.S. 693, 701 (1976), reh'g denied, 425 U.S. 985 (1976)), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986)), on remand, 144 Fed.Appx. 746 (10th Cir. 2005), reminding civil rights plaintiffs that "not 'all common-law duties owed by government actors were ... constitutionalized by the Fourteenth Amendment.'" DeShaney, 489 U.S. at 202 (quoting Daniels, 474 U.S. at 335). Accordingly, no compelling reasons exist for this Court to review or reiterate its well-reasoned and well-stated principles.

Finally, while making no representations regarding the merits of Petitioner's claims against the other Respondents, it is respectfully suggested that this Court distinguish between the facts allegedly known by and representations of the Respondents, City of Monesson and Officer Carl Franzaglio, as there are no allegations that any of the Westmoreland County Respondents knew of Petitioner's purported belief that his family was in danger, that he sought police aid, or that any representations were made with respect to the protection of his family or the arrest of Koschalk. Since there are no allegations that the Westmoreland County Respondents were

aware that this occurred, such acts cannot be imputed to them for purposes of constitutional liability.

III. THE PETITION FOR A WRIT OF CERTIORARI RELATIVE TO THE THIRD CIRCUIT COURT OF APPEALS' DISMISSAL OF THE PETITIONER'S STATE LAW CLAIMS MUST BE DENIED WHERE NO COMPELLING REASONS EXIST FOR THIS COURT'S CONSIDERATION.

The District Court was entirely correct in dismissing plaintiff's state law claims against the Westmoreland County defendants and the Third Circuit Court appropriately applied established precedent supporting this dismissal. The Pennsylvania Political Subdivision Tort Claims Act grants immunity for government actors for negligent conduct with few exceptions. 42 PA. CONS. STAT. § 8545 (2006). Negligence in revoking probation is not one of the exceptions. After completing that analysis, the court appropriately reviewed the willful misconduct language contained in the statute. 42 PA. CONS. STAT. § 8550 (2006). Recognizing that willful misconduct in both the Pennsylvania and Federal courts is analogous to an intentional tort and requires that the actor desired to bring about the result, the lower courts appropriately dismissed the Petitioner's amended pleading, finding the allegations insufficient to establish willful misconduct. The Third Circuit Court stated:

> Bright does not allege that the individual state defendants desired to bring about harm to Annette Bright (or to her sister) or that they were aware that such harm "was substantially certain to follow." Rather, Bright alleges in his complaint that they acted with "deliberate indifference." App. at 58-a, and

> argues in his brief that they "knowingly and deliberately disregarded a known risk." Br. Appellant at 26. Assuming *arguendo* that a reasonable jury could infer such culpability from the facts alleged, the individual state-actor defendants would still not having engaged in "willful" misconduct and would still be entitled to immunity.

(Pet. Apx. 26A).

The lower courts appropriately addressed the state law claims and no compelling reason whatsoever exists for the Petitioner to raise this issue before this Honorable Court on request for certiorari. In fact, both the District Court and the Third Circuit appropriately cited and relied upon precedent from this Honorable Court by addressing the immunity issues "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." Saucier v. Katz, 533 U.S. 194, 200 (2001), on remand, 262 F.3d 897 (9th Cir. 2001). Accordingly, certiorari must be denied.

CONCLUSION

This Honorable Court granted certiorari in DeShaney for the sole purpose of addressing the issue of when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's rights under the Due Process Clause of the Fourteenth Amendment. Id. at 194. After careful consideration of the text, meaning, and intent of the Due Process Clause, and acknowledging that one's sympathies may desire a different result when tragedy ensues, this Court declined to expand the scope of the Due Process Clause to require State actors to protect individuals against private acts of violence. Id. at 197, 203. Here, the United

States Court of Appeals for the Third Circuit faced an equally tragic set of circumstances involving the heartless murder of a minor child. Despite this daunting task, the Third Circuit followed this Court's direction in DeShaney and held that no constitutional violations were, or could be, alleged by the Petitioner herein. Contrary to Petitioner's assertions, the factual circumstances presented here do not warrant an expansion of the Due Process Clause, nor do any compelling reasons exist for this Court to reiterate its well-established precedent, which has been uniformly followed by the circuit courts. Accordingly, the Respondents respectfully submit that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 06-563

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Petitioners,

v.

WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS CITY OF MONESSEN AND CARL FRANZAGLIO, INDIVIDUALLY AND IN HIS CAPACITY AS A POLICE OFFICER FOR THE CITY OF MONESSEN

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether this Court should deny review of this case since the Petitioner has presented no compelling reason for this Court to exercise its extraordinary jurisdiction in that the state-created danger theory as set forth by the Third Circuit Court in the decision *Bright* does not substantially conflict with any precedent of this Court, Section 1983, the Due Process Clause, any circuit court's decisions, or any of the Third Circuit Court's decisions?

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REASONS FOR DENYING WRIT

This Honorable Court should deny Plaintiff Bright's Petition for a Writ of Certiorari because Plaintiff has failed to present compelling reasons for this Court to exercise its extraordinary and discretionary jurisdiction.

I. Compelling reasons which may lead this Court to grant a Writ of Certiorari

Although not exhaustive, Supreme Court Rule 10 sets forth guidelines for the certiorari process and when same will be granted. Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; had decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

> court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10.

II. Plaintiff has failed to cite to any compelling reason for this Court to grant certiorari

In this case, Plaintiff claims that there are several compelling reasons for this Court to grant review.[1] Plaintiff alleges that the Third Circuit Court's state-created danger theory is in conflict with this Court's prior precedent, Section 1983 and the Due Process Clause of the

[1] The reasons alleged by Plaintiff as to why this Court should grant certiorari pertain to the Third Circuit's decision as to the state-created danger theory. In Plaintiff's Brief to this Court, Plaintiff also includes in the "Questions Presented for Review" the issues of whether the Third Circuit Court of Appeals erred in finding the state tort wrongful death and survival actions were insufficient as a matter of law since Defendants were not entitled to immunity and in dismissing the state law claims against Defendant Koschalk. However, neither of these issues are raised in "Reasons for Granting the Writ," and therefore, these issues have been waived.

Fourteenth Amendment.[2] Plaintiff further argues that there is a conflict between the decision of *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. Pa. 2006), and other circuit courts' tests as to the state-created danger theory. Lastly, Plaintiff claims that there is a conflict within the Third Circuit as to the state-created danger theory that warrants this Court granting review of same. However, none of these arguments have any merit.

A. There is no substantial conflict between the Third Circuit Court's decision in *Bright*, this Court's prior precedent, Section 1983 and the Due Process Clause of the Fourteenth Amendment.

Plaintiff requests that this Court grant certiorari in this case because the opinion in *Bright* is allegedly contrary to this Court's prior precedent, Section 1983 and the Due Process Clause of the Fourteenth Amendment. However, the reasoning and holding in *Bright* is consistent with this Court's precedent, specifically its interpretation of Section 1983 and the Due Process Clause of the Fourteenth Amendment.

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[2] It is important to note that the Third Circuit Court in *Bright* affirmed the district court based on Plaintiff's failure to plead facts to support the fourth prong of the state-created danger theory. The Third Circuit specifically stated that it did not need to decide whether Plaintiff had pled sufficient facts for the other three prongs of the state-created danger theory. 443 F.3d at 284, n. 8. However, Defendants raised the argument before the district court and the Third Circuit Court that the alleged harm, the murder of the under-aged girl's sister, was not foreseeable, and therefore, the first prong of the state-created danger theory must fail as a matter of law. Judge Smith of the Third Circuit Court agreed. *Id.*

The Third Circuit in *Bright* began its analysis with a detailed discussion of this Court's prior case *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). In *DeShaney*, a tragic case in which a four-year-old boy was beaten so badly that he was left with severe brain damage, this Court concluded " . . . [b]ased upon its the text, history and case law . . . that the Due Process Clause did not impose an affirmative obligation on the state to protect its citizens. . . . " *Bright*, 443 F.3d at 280 (*citing DeShaney*, 489 U.S. at 195-96). The Third Circuit further acknowledged this Court's reasoning for determining that the government does not have an affirmative constitutional duty to protect its citizens:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.
>
> * * *
>
> Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.
>
> * * *
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which

> the government itself may not deprive the individual.

Id. (*citing DeShaney*, 489 U.S. at 195-96).

DeShaney was not the only case in which this Court found that the state does not have an affirmative constitutional duty pursuant to the Due Process Clause of the Fourteenth Amendment and Section 1983, to protect citizens, except under limited circumstances. Prior to *DeShaney*, and since *DeShaney*, this Court has been careful not to expand the Due Process Clause. In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court explained that history supports that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." *Id.* (*citing Hurado v. California*, 110 U.S. 516, 527 (1884) (*quoting Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819)). This Court in *Daniels* also instructed that "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" *Id.*, 474 U.S. at 328, 330 (*quoting Parratt v. Taylor*, 451 U.S. 527, 549 (1981)).

This Court has been careful in other cases not to expand what it firmly believes is the government's duty pursuant to the Due Process Clause. Thus, in *Harris v. McRae*, 448 U.S. 297, 317-18 (1980), this Court held that although the states may not prohibit abortions, there is no affirmative duty to provide funding for this procedure. *See also Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that states have no affirmative duty to provide adequate housing). More recently, in *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2802 (2005), this Court determined

that the government's failure to properly respond to a restraining order violation did not constitute a violation of her Fourteenth Amendment rights.

This Court has consistently found that the Due Process Clause does not impose on the states an affirmative duty to protect citizens[3]. The Third Circuit's reasoning and holding in the *Bright* case is consistent with the plain language of the Due Process Clause and this Court's interpretation of same. Specifically, although it is admittedly sometimes difficult to differentiate action from inaction[4], this prong of the Third Circuit's state-created

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[3] This Court also is cognitive of the numerous and various policy reasons for not finding that a state has an affirmative duty to protect its citizens. Without providing this Court with a dissertation, one strong presumption against governmental liability in failure-to-protect cases is because same would involve the courts in second-guessing political decisions about the use of limited community resources. Barbara E. Armacost, *Article: Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1009 (1996). " . . . [G]overnment actors require freedom in allocating their resources, weighing safety considerations, and heeding the voices of the public at large. Consequently, the state-created danger theory should be narrowly construed in order to avoid usurping state decisions and legislative choices." Jeremy Daniel Kernodle, *Note: Policing the Police: Clarifying the Test for Holding the Government Liable under 42 U.S.C. Section 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 200 (2001). "Expanding the state-created danger theory may deter government officials from taking risks and executing their functions for the public's greatest benefit." *Id.*, 54 VAND. L. REV. at 201. Along with this is the problem of the sheer number of claims that could be brought pursuant to a broader reading of the Due Process Clause. "[T]he litigation burden on government entities and public officials would be enormous." 94 MICH. L. REV. at 1034.

[4] As this Court has advised, " . . . many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary. . . . " *Daniels*, 474 U.S. at 334. The inaction versus action distinction should not be abandoned simply because it is sometimes difficult to apply.

danger theory is reasonable and necessary in order to ensure that the state will not be held liable for its failure to act or protect. This prong of the Third Circuit's state-created danger theory is not contrary to constitutional law or this Court's precedent. Instead, the decision in *Bright* follows the rationale in *DeShaney* for not imposing on the states an affirmative duty to protect.

B. There is no substantial conflict between the Third Circuit Court's decision in *Bright* and the decisions of other circuit courts as to the state-created danger theory.

One reason that this Court sometimes grants certiorari is when decisions of the various circuit courts are in conflict *as to an important issue*. Not all potential conflicts are compelling though. In fact, not surprisingly, this Court has not been able to, and has not even tried, to resolve every possible inter-circuit conflict. Glenn W. Reimann, *Sour Grapes or Sound Criticism: Is the Supreme Court Really Not Taking Enough Non-tax Business Cases?*, 8 U. MIAMI BUS. L. REV. 161, 190 (1999). Instead, it has been opined that generally, " . . . intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995). For an intercircuit conflict to be compelling enough to warrant review, it must be so intolerable that it creates unfairness to litigants in different circuits. *Id.*, 56 U. PITT. L. REV. at 773.

1. The Third Circuit's finding in *Bright* that an affirmative act is necessary in order to state a constitutional claim based on a state-created danger theory has not created a substantial conflict with other circuit courts.

One of Plaintiff's primary contentions is that the Third Circuit is incorrect in incorporating into its state-created danger test the necessity for an affirmative act by the state that places the plaintiff in a worse position. However, out of the ten circuit courts that recognize a state-created danger theory[5], *all* of them require that there be an affirmative act by the state for the state-created danger theory to be applicable. *See Bright v. Westmoreland County*, 443 F.3d 276, 282 (3d Cir. 2006) (explaining that liability under a state-created danger theory is predicated upon the state's affirmative acts); *Wyke v. Polk County School Board*, 129 F.3d 560, 570 (11th Cir. 1997) (*quoting DeShaney*, 489 U.S. at 200) (noting that it will

[5] Two circuit courts, the First Circuit and the Fourth Circuit, have not yet adopted the state-created danger theory as a viable constitutional claim. The First Circuit has not yet rejected this theory, but instead has avoided addressing whether it will recognize a viable constitutional claim pursuant to said theory. *See Rodriguez-Cirilo v. Garcia*, 115 F.3d 50 (1st Cir. 1997). Only the Fourth Circuit has outright rejected a constitutional claim based on a state-created danger theory. *See Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995). Although two circuits have not adopted the state-created danger theory, this does not result in there being a substantial conflict that this Court should address by reviewing the instant case. At no time during this litigation have any of the parties argued, or any of the courts found, that the state-created danger theory is not an accepted, valid theory to assert a constitutional claim under the right circumstances. Since whether or not the state-created danger theory is valid is not in controversy in this case, there is no true conflict between this case and the Fourth and/or First Circuits.

find liability under the state-created danger theory when the state affirmatively acts to restrain an individual's freedom to act on his own behalf); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (finding liability based on the state-created danger theory when the state in some way assists in creating or increasing the danger to the plaintiff); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (explaining that liability is based upon affirmative acts by the state that either creates or increases the risk of violence); *Losinski v. County of Trempealeau*, 946 F.2d 544, 551 (7th Cir. 1991) (finding that before there can be liability, there must be an affirmative act by the state); *Carlton v. Cleburne County*, 93 F.3d 505, 508 (8th Cir. 1996) (requiring affirmative action on the part of the state actor for there to be a state-created danger claim); *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1061 (9th Cir. 1998) (finding that it must be proven at least that the state acted affirmatively); *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (explaining that to sustain a state-created danger claim there must be an affirmative act by a state actor that increases or creates the danger to plaintiff); *McClendon v. City of Columbia*, 258 F.3d 432, 437-38 (5th Cir. 2001) (instructing that courts should consider whether a state actor acted with affirmative conduct); and *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 (10th Cir. 1998) (finding that the key factor is the degree of the state actor's culpable knowledge and conduct in affirmatively placing the individual in a position of danger).

Since the other circuit courts that have adopted the state-created danger theory also require an affirmative act by a state actor in order to establish a valid claim, the Third Circuit Court's decision in *Bright* is not contrary to

the decisions of any of the circuits which have already adopted this theory.

2. The Third Circuit's failure to specifically apply and/or adopt the alleged "emboldenment theory" in the *Bright* case does not create a conflict with the decisions of any other circuit courts.

The only other potential conflict raised by Plaintiff between the state-created danger theory affirmed by the Third Circuit in *Bright*, and the state-created danger tests of other circuits, is that a small number of the other circuits have made references to the private third party as being emboldened by the state actors and that this can constitute a state-created danger. Plaintiff argues that this Court should grant his Petition for Writ of Certiorari to determine whether the state-created danger test can include a "theory of emboldenment" since other circuits have referenced same. However, Plaintiff's argument fails to acknowledge the important difference between the facts pled in his Amended Complaint and the facts pled in the complaints at issue in the cases *May v. Franklin County Board of Commissioners*, 59 Fed. Appx. 786 (6th Cir. 2003)[6] and *Brown-Alleyne v. White*, 1999 U.S. Dist. LEXIS 18511 (E.D.N.Y. 1999).

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[6] The Sixth Circuit in the *May* case did not find that "emboldenment" could occur in the absence of an affirmative act. In fact, the Sixth Circuit explained that, "[l]iability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." 59 Fed. Appx. at 792. In *May*, the Sixth Circuit found that the police officer's conduct of going to the door of the apartment where she was being held against her will, knocking, and then leaving, emboldened her kidnapper. *Id.*, 59 Fed. Appx. at 792-93. Thus, it appears from

(Continued on following page)

Plaintiff claims that *May*, *supra*, and *Brown-Alleyne*, *supra*, stand for the proposition that when a state actor emboldens a perpetrator to harm the plaintiff through a combination of action and inaction, there can be a possible constitutional claim based on same. Although the courts in both *May* and *Brown-Alleyne* refer to the perpetrator of the harm being "emboldened" by the state actor, neither of these cases stand for the proposition that if there is emboldenment, there does not need to be an affirmative act which itself increases the risk of harm or danger. In both of these cases, the courts pointed out that an affirmative act which emboldens the perpetrator or increases the risk of harm was required in order to establish a state-created danger theory. *May*, 59 Fed. Appx. at 792; *Brown-Alleyne*, 1999 U.S. Dist. LEXIS 18511 at *6, *9. There is no inconsistency between these cases and the *Bright* case.

Notably, in *Brown-Alleyne*, the alleged *act that led to the emboldenment* of the private third party was a conspiracy on the part of the police not to provide protection. It was pled that there was a deliberate decision within the police department not to prosecute the private third party or assist the plaintiff. *Brown-Alleyne*, 1999 U.S. Dist. LEXIS 18511 at *7-*9. A "conspiracy" necessitates by definition an affirmative act. In fact, there was not just one deliberate act to conspire by the police, but several acts, including the police escorting the private third party from the building after he assaulted the plaintiff and berating plaintiff for calling the police. *Id.*, 1999 U.S. Dist. LEXIS 18511 at *9. A review of the *Brown-Alleyne* case

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the Sixth Circuit's use of the term "embolden" that it was considering this in light of the fact that plaintiff had pled affirmative acts. This is not contrary to the Third Circuit's state-created danger theory.

makes it clear that the court's use of the term "embolden" was used in conjunction with the requirement of an affirmative act that leaves the plaintiff more vulnerable to future violence at the third party's hands. *Id.*, 1999 U.S. Dist. LEXIS 18511 at *8. Thus, even if the district court case *Brown-Alleyne* was controlling in any circuit, the state-created danger theory in that case, which includes "emboldenment" does not really conflict with the *Bright* case.

The other case cited to by Plaintiff for the proposition that the *Bright* case conflicts with other circuit court decisions regarding the state-created danger theory is *May*, *supra*. However, the Sixth Circuit Court of Appeals specifically acknowledged in a later case that the decision in *May* was not precedential since it was unpublished. *Tanner v. County of Lenawee*, 452 F.3d 472, 479 (6th Cir. 2006) (noting that the plaintiff's attempt to cite the *May* case for the proposition that responding to a 911 call gave rise to a duty to protect the caller is not precedential). Moreover, in *May* it was averred in the complaint that what caused the perpetrator to become emboldened were several allegedly affirmative acts by the police, including knocking on the door of plaintiff's apartment, looking into the window, and leaving the apartment. Plaintiff claimed that these allegedly affirmative acts by the police emboldened the perpetrator, who was inside the apartment with plaintiff the entire time the police were outside, to then kill her. *May*, 59 Fed. Appx. at 792-93. The district court in *May* found that these facts as pled were sufficient to establish that an affirmative act by the state increased the risk of danger. *Id.*

To the contrary, in *Bright*, Plaintiff averred in his Amended Complaint that an allegedly affirmative act, i.e.

the confrontation, combined with the omission, i.e. the delay in processing the revocation of probation, emboldened Koschalk or increased the risk of harm to Plaintiff. *See* para. 30(f)(4)-(h) and (31) of Plaintiff's Amended Complaint. (App. 71A-72A). This is different from the allegations pled by the plaintiff in *May* where it was claimed that the *affirmative acts combined together* emboldened the perpetrator and/or increased the risk of harm to the plaintiff. The district court in *May* explained that because it had to accept the facts as pled in the complaint, which included that the police officer did several affirmative acts that emboldened the perpetrator, it could not dismiss the complaint on that basis. *May*, 59 Fed. Appx. at 792-93.

In the instant case, the Amended Complaint specifically alleges only one *arguably* affirmative act, specifically, the confrontation[7]. *See* Plaintiff's Amended Complaint. (App. 64A-76A). What emboldened Koschalk is the confrontation, " . . . coupled with the aforementioned inexplicable *delay*. . . ." *See* para. 30(h) of Plaintiff's Amended Complaint. (App. 72A) (emphasis added). Accepting these

[7] The Third Circuit noted that Officer Franzaglio's offer to help the family by arresting Koschalk was simply a statement of intent to help which courts have routinely found does not lead to a duty to protect. The Third Circuit explained, "Bright does not, and cannot, claim that the state in any way restricted his freedom to act on his family's own behalf. The *DeShaney* Court specifically held that, under these circumstances, no 'affirmative duty to protect arises . . . from the State's . . . *expressions of intent to help*' an individual at risk." *Bright*, 443 F.3d at 284 (*citing DeShaney*, 489 U.S. at 200) (emphasis in original). Notably, Officer Franzaglio's offer to help also cannot be perceived as having emboldened Koschalk to kill the victim's sister since there are no facts pled that Koschalk knew about the conversation between Officer Franzaglio and the Bright family.

facts as true, the district court in the *Bright* case, and as affirmed by the Third Circuit Court of Appeals, concluded that the Plaintiff had failed to plead a prima facie case of state-created danger since Plaintiff claimed it was the alleged affirmative act, the confrontation, along with the failure to follow up, that emboldened Koschalk and increased the risk to Plaintiff. The fourth prong of the state-created danger theory in the Third Circuit requires that an affirmative act cause the danger or increase the risk of harm. *It is not sufficient to allege an act, which by itself does not create or increase the risk of danger, combined with omissions, to meet the fourth prong.* This conclusion is not inconsistent with the decisions in *May* or in *Brown-Alleyne.*

Additionally, the Third Circuit, in *Bright*, clearly did not outright reject the "emboldenment theory" as possibly being part of its state-created danger theory under the right circumstances. To the contrary, the Third Circuit in *Bright* found that it did not need to address whether emboldenment can be a valid theory for liability in light of the facts alleged in the Amended Complaint. Specifically, the Third Circuit found that the alleged emboldenment at issue in the *Bright* case was the delay, or the inaction, in revoking Koschalk's probation. The Third Circuit explained:

> It is specifically alleged that what "emboldened" Koschalk and thereby contributed to that decision was a belief "that he would not confront effective law enforcement action as he progressed with his scheme to retaliate." First Amended Complaint at P31, App. at 58a. It is the state's creation of that belief that is said to have rendered Annette more vulnerable than she would otherwise have been. We may assume for present

> purposes that the creation of that belief could reasonably be attributed to the ten week delay in serving Koschalk with notice of his probation violation hearing. It could not reasonably be attributed, however, to the probation officer's calling a probation violation a probation violation when confronted with it on May 4th.

Bright, 443 F.3d at 285. Because what allegedly emboldened Koschalk was clearly inaction, the delay in providing notice of his probation violation and hearing, and not an affirmative act as required by the fourth prong of the Third Circuit's state-created danger theory, the Third Circuit confirmed that the fourth prong of the test could not be met by the facts pled in Plaintiff's Amended Complaint. Since the facts alleged in Plaintiff's Amended Complaint could not meet the fourth prong, i.e. that an affirmative act that itself created an opportunity of danger to the victim or rendered the victim more vulnerable to the danger than had the state not acted at all, it was unnecessary for the Third Circuit to then examine the validity of the alleged "emboldenment theory".

C. The *Bright* case does not create a conflict within the Third Circuit as to the state-created danger theory that warrants this Court granting review of this case.

1. The proposed "test" advocated by Plaintiff and the dissent in *Bright* for the fourth prong of the state-created danger theory is not consistent with this Court's rationale in *DeShaney* which is the basis of the state-created danger theory.

Although Plaintiff and the dissent in *Bright* argue that the majority's opinion incorrectly adds an element or

extra requirement to the fourth prong of the Third Circuit's state-created danger theory, in reality, *it is the test proposed by Plaintiff and the dissent that is inconsistent with established Third Circuit law.* Since the dissent's opinion is not controlling and precedential, there is no compelling "intra-circuit" conflict for this Court to review.

a. The Plaintiff's and the dissent's interpretation of the fourth prong of the state-created danger theory is a misstatement of the law.

Although not specifically stated as such, essentially the Plaintiff argues, and the dissent in *Bright* agrees, that it is incorrect that the state-created danger theory in the Third Circuit requires an affirmative act that itself caused or increased the risk of injury to establish the fourth prong. Instead, the Plaintiff and the dissent claim that the fourth prong can be met when there is an omission that increases the danger, combined with an allegedly affirmative act, even if that affirmative act did not contribute to or increase the danger to the plaintiff by itself. The dissenting judge in *Bright*, Judge Nygaard, stated that it is the " . . . totality of the conduct that must be analyzed under the fourth element of the state-created danger exception." *Bright*, 443 F.3d at 290. Judge Nygaard explains that although mere inaction will not support a state-created danger claim, if there is an act, coupled with an omission that increases the alleged harm, this is sufficient. *Id.*, 443 F.3d at 290-91. The implication from the test proposed by Judge Nygaard is that the omission can be what increased the danger to the Plaintiff as long as there also is some type of affirmative act involved, and even if that affirmative act by itself would not have

increased the danger.[8] However, omissions, without an affirmative act that causes or increases the risk of harm, are not actionable constitutional violations.

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[8] At one point, Judge Nygaard in his dissent indicates that Plaintiff has pled that the confrontation itself, which is the only averred fact that arguably may constitute an affirmative act, triggered the increased risk of violence. *Bright*, 443 F.3d at 291. However, this is incorrect. Judge Nygaard stated that there is an inference from this allegation that the " . . . the confrontation itself plays an integral role in creating an opportunity for harm that would otherwise not have existed, placing this case outside the purview of *DeShaney* and firmly within the ambit of our state-created danger exception." *Id.* Judge Nygaard then states that because the Plaintiff claimed in his Amended Complaint that the confrontation itself triggered an increased risk of harm that this must be accepted as true for purposes of a Rule 12(b)(6) motion. *Id.*, 443 F.3d at 291, n. 13. By making these statements, it appears that Judge Nygaard is asserting that even if the majority finds that the fourth prong of the state-created danger theory requires an affirmative act that itself causes or increases the risk of harm to the plaintiff, Plaintiff's Amended Complaint pleads sufficient facts to meet that standard. Nowhere in Plaintiff's Amended Complaint, however, does Plaintiff claim that the allegedly affirmative act, i.e. the confrontation, alone increased the risk of danger to Plaintiff. *See* Plaintiff's Amended Complaint. (App. 64A-76A). To the contrary, it is repeatedly alleged in Plaintiff's Amended Complaint that it was the confrontation, *coupled with the alleged delay*, which increased the risk of harm. *See* para. 30(f)(4), 30(g)(h) and 31 of Plaintiff's Amended Complaint. (App. 64A-72A). Since there were no facts pled in the Amended Complaint to support that the confrontation itself, the only possible affirmative act pled, increased the risk of danger, the majority did not have to accept same as true for purposes of the Rule 12(b)(6) motion.

b. The Plaintiff's and the dissent's interpretation of the fourth prong of the state-created danger theory as not requiring an affirmative act that itself causes or increases the risk of harm is inconsistent with this Court's precedent and interpretation of the Due Process Clause.

Omissions coupled with unrelated allegedly affirmative acts are not sufficient to meet the fourth prong of the state-created danger theory. This is supported by the reasoning in *DeShaney*, *supra*. Although this Court did not specifically address the issue of the state-created danger theory in *DeShaney*, this test was adopted by many courts because of wording contained in *DeShaney*, which indicated that this Court would likely find that if the state created danger, then this may be an exception to the general rule that a state has no duty to protect citizens from violence by private actors. This language was discussed by the majority in *Bright* as being the foundation for the Third Circuit Court's state-created danger theory. *Bright*, 443 F.3d at 280-81.

Specifically, in *DeShaney*, there was an affirmative act by the state. The state at one point had removed a young boy from his father's home. *DeShaney*, 489 U.S. at 192. The state then released the boy back to his father's home. During the months following the boy's release back to his father's home, a state case worker was aware of signs and reports of abuse, but did nothing. *Id.* During this period of time, the boy's father beat him so severely that he became brain-damaged. *Id.* This Court first found that there is no constitutional duty for the state to protect citizens from violence of third parties. *Id.*, 489 U.S. at 196-97. This

Court then went on to discuss a possible exception to this rule, i.e. if there is a special relationship between the state and the citizen such as the citizen being in state custody. Under those circumstances, there may be a duty to protect. *Id.*

This Court then explained, in *DeShaney*, that the only other possible scenario in which a state may have a duty to protect a citizen from a private actor would be if it played a part in the creation of the danger or made that citizen more vulnerable to the danger. *DeShaney*, 489 U.S. at 200. Importantly, this Court did not find that because the state had at one point taken the affirmative act of placing the boy in state custody, but then released him, that this was sufficient to establish that the state created or increased the danger to the boy. In fact, this Court explained that returning the boy to his father's custody placed him in no a worse position than he was before. *Id.* This Court further explained that the state does not become the " . . . permanent guarantor of an individual's safety by having once offered him shelter." *Id.* Although not specifically stated in *DeShaney*, it appears that the affirmative act of removing the boy from his home, coupled with the failure to then protect him after he was returned to his home, was not sufficient for this Court to find that the state increased the risk of danger to the boy. The later alleged omissions by the state also were not enough to create a duty to protect.

The reasoning in *DeShaney*, which was cited to by the majority in *Bright*, is instructive on what triggers the state to become responsible to protect a citizen from actions by a private person. Pursuant to this Court's reasoning in *DeShaney*, the affirmative act by the state must be what causes or increases the risk of harm in order

for the state to have a duty to protect. This is not only the rationale used in *DeShaney*, but also is supported by common sense and public policy. If this Court in *DeShaney* had found that the state's one time attempt to help the boy then triggered a continuing duty to protect him, for which the state could become liable for failing to do, then this would discourage state actors from attempting to perform their jobs, which may include helping private citizens.

In the instant case, if the Third Circuit accepted the proposed test set forth in *Bright* by the Plaintiff and the dissent, then any time there is an affirmative act by the state to help a private citizen, but later that citizen is injured, there would be an arguable constitutional violation. This would result in the state becoming the warrantor of the private citizens' welfare and safety, something which this Court in *DeShaney* specifically found that the Due Process Clause doesn't support. This also would encourage state employees to do nothing instead of attempting to perform their jobs or help private citizens. It is respectfully submitted that this is certainly not a situation that this Court wishes to encourage through the state-created danger theory, and in fact, the *DeShaney* case supports same. Thus, if any conflict exists, it is between the dissent's opinion and this Court's decisions.

2. The majority's opinion in *Bright* is not contrary to or inconsistent with the Third Circuit's prior cases as alleged by Plaintiff and the dissent.

This Court should also reject Plaintiff's request for certiorari since there really is no substantial conflict *within* the Third Circuit as to the state-created danger theory. From the time the state-created danger theory was

adopted in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), to as recently as the case *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006),[9] the Third Circuit has consistently found that there must be an affirmative act that causes or increases the danger in order to meet the fourth prong of the state-created danger theory. In fact, even before the Third Circuit officially adopted the state-created danger theory in *Kneipp*, it noted that if said theory was applicable, the plaintiff would be required to plead facts to support that an affirmative act created a danger to plaintiff that he or she otherwise would not have encountered. *See D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1374 (3d Cir. 1992) (explaining that the state-created danger theory is " . . . predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger.")[10]; and *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) (noting that the state-created danger theory required that the state actors used their authority to create an opportunity that otherwise

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[9] In *Sanford*, the Third Circuit agreed with the district court that plaintiff was attempting to characterize the defendant's failure as an affirmative action, when instead, it was really an allegation that the defendant failed to prevent the plaintiff's death. It did not accept this factually unsupported conclusion as true. The Third Circuit in *Sanford* affirmed that a failure to prevent injury or protect is not something that violates the Due Process Clause according to *DeShaney*, and therefore, it affirmed the district court's judgment in favor of defendant. *Sanford v. Stiles*, 456 F.3d at 312.

[10] In *D.R. by L.R.*, the Third Circuit found that it was necessary to plead an affirmative action in order to establish a claim based on a state-created danger theory even though it also acknowledged that sometimes it could be difficult to distinguish between action and inaction. *Id.* The Third Circuit then went on to find that the school defendants did not create the plaintiff's peril or increase the risk that she would be assaulted by other students in the school's bathroom. *Id.*, 972 F.2d at 1375.

would not have existed, but declining to apply said test since it found that the alleged risk at issue was not foreseeable).

The majority in *Bright* specifically addressed the issue of whether it was improperly reading a requirement of an affirmative act into the fourth prong of the state-created danger theory. The majority, in rejecting said argument, explained that the very language cited to by the dissent, i.e. that the "state used its authority to create an opportunity that otherwise would not have existed" requires an affirmative act. *Bright*, 443 F.3d at 283, n. 6. The majority in *Bright* stated:

> We perceive no conflict, however, between *D.R.* and those cases which phrase the fourth element in terms of whether "state actors used their authority to create an opportunity that would not otherwise have existed" for injury to the plaintiff. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). In our view, "state actors" cannot "use their authority" to create such an opportunity by failing to act.

Id. The requirement that the state actor uses his or her authority to create a danger necessitates an affirmative act. Otherwise, the state actor would not be "using" his or her authority. The majority essentially found that the Plaintiff and dissent were attempting to create a distinction where no distinction really existed.

The cases cited to by Plaintiff and in the dissent's opinion in *Bright* are not contrary to the majority's finding that an affirmative act is necessary in order to establish the fourth prong of the state-created danger theory. Plaintiff

attempts to argue that the Third Circuit in the *Morse v. Lower Merion School District*, 132 F.3d 902 (3d Cir. 1997)[11], rejected its earlier decisions in which it required an affirmative act in order for a plaintiff to establish the fourth prong of the state-created danger theory. The entire basis for this argument is one sentence taken out of context in the *Morse* case. The sentence at issue states, "[t]hus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act." *Id.*, 132 F.3d at 915. This one sentence is the foundation for the Plaintiff's and the dissent's argument that the Third Circuit has rejected its prior requirement of an affirmative act.

Importantly, and as the majority in *Bright* pointed out, this one sentence in *Morse* must be read in the context in which it was stated and not in isolation. *Bright*, 443 F.3d at 283, n. 7. In *Morse*, the plaintiff, who was a teacher at a day care center within the defendant school, was killed by a mentally disturbed third party who entered the school through a door that was supposed to be kept locked. It was alleged that the school had unlocked the door so as to allow construction workers to have easy access to

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[11] Judge Nygaard argues in his dissent that the majority improperly inserts the word "affirmatively" into the fourth prong of the state-created danger theory. *Bright*, 443 F.3d at 292. However, Judge Nygaard in his concurring opinion in the case *Schieber v. City of Philadelphia*, 320 F.3d 409, 425 (3d Cir. 2003), specifically noted " . . . '[l]iability under the state-created danger theory is predicated upon the states' *affirmative* acts which work to plaintiffs' detriment in terms of exposure to danger.'" (*citing D.R. by L.R.*, 972 F.2d at 1374) (emphasis added).

perform their jobs. *Morse*, 132 F.3d at 904. In affirming the district court's grant of summary judgment to the defendant school, the Third Circuit Court held that the plaintiff failed to prove the first prong of the state-created danger theory. Specifically, it held that plaintiff failed to prove that it was foreseeable that unlocking the school door so that construction workers could use same would result in a murder by a mentally unstable third party. *Id.*, 132 F.3d at 908.

In *Morse*, the Third Circuit also discussed the fourth factor of the state-created danger theory and whether it had been met by the plaintiff. The Third Circuit noted that the district court had found that plaintiff did plead an affirmative act, i.e. the school's unlocking the school's door, but had not then gone on to find whether the fourth prong had been met since it found that plaintiff had failed to meet the first prong of foreseeability. The district court also stated that despite the fact that there was an affirmative act, it did not know whether that act rose "to the level required to impose liability under the state-created danger theory". *Id.*, 132 F.3d at 914.

It was within this context that the Third Circuit Court in *Morse* discussed that "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act." The Third Circuit was addressing the fact that even if a plaintiff can plead an affirmative act, that doesn't necessarily mean there is liability pursuant to the state-created danger theory. The determinative factor is whether the danger was foreseeable. If the danger is not foreseeable, then even if there is an affirmative act, there will be no liability.

The Third Circuit in *Bright* discussed the context of this statement in *Morse* and concluded:

> We concluded [in *Morse*] the question of whether an affirmative act was required had been answered by *Mark v. Borough of Hatboro. Mark* articulated the fourth element of the test as requiring that "state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *Mark v. Borough of Hatboro,* 51 F.3d 1137, 1152 (3d Cir. 1995). A use of authority that creates an opportunity for harm necessarily entails an affirmative act. But an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff. In *Morse*, this meant asking whether unlocking the door created a foreseeable opportunity for the plaintiff to be attacked by a mentally ill intruder. Only then would the state actor have "used its authority to create an opportunity which otherwise would not have existed for the specific harm to occur." *Morse,* 132 F.3d at 914. In this context, we do not read *Morse's* language to suggest liability can be based on an omission alone or a failure to act. We read it to clarify that the relevant test involves asking whether a state actor's behavior constituted an affirmative act, and, if so, whether the affirmative act created a foreseeable opportunity for harm.

Bright, 443 F.3d at 283, n. 7 (emphasis in original). As stated by the Third Circuit in *Bright*, when *Morse* is examined in its entirety, it does not stand for the proposition that the Third Circuit has rejected the requirement that there be an affirmative act in order for there to be a valid claim based on the state-created danger theory.

Subsequent Third Circuit case law also confirms that an affirmative act is necessary. *See Sanford*, *supra*; *Kaucher v. County of Bucks*, 455 F.3d 418, 431 (3d Cir. 2006) (noting that the state-created danger theory may be applicable when the " . . . state may assume responsibility for the safety of an individual for whom it affirmatively creates or enhances a risk of danger.") (*citing Kneipp*, 95 F.3d at 1208); *Mohammed v. the Sch. Dist. of Phila.*, 2006 U.S. App. LEXIS 13814 at *5-*6 (3d Cir. 2006) (noting with approval its prior decision *Bright*, specifically that liability pursuant to the state-created danger theory is " . . . predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of exposure to danger.") (*citing D.R. by L.R.*, 972 F.2d at 1374) (emphasis in original); and *Vasquez v. AG of the United States*, 2006 U.S. App. LEXIS 31237 at *11-*12 (3d Cir. 2006) (explaining that the state-created danger theory may be applicable when the state affirmatively places the person in a position of danger the person otherwise would not have faced).

The other case cited by Plaintiff which he claims stands for the proposition that an affirmative act is not necessary to establish the fourth prong of the state-created danger theory is *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004). Plaintiff argues that in *Rivas*, the Third Circuit found that an omission was sufficient to establish the fourth prong of the state-created danger theory. However, in *Rivas*, the Third Circuit applied the well-established fourth prong of the state-created danger theory and found that there was an affirmative act that put the plaintiff in more danger than if the defendant state actors had not acted at all. Briefly, in *Rivas*, emergency personnel were called to plaintiff's home because he appeared to be having a seizure. One of the emergency personnel claimed

that when she entered the home, the plaintiff attacked her. *Id.*, 365 F.3d at 185. The emergency personnel telephoned the police and reported to them that they were attacked by the plaintiff and requested assistance. Upon arriving, the police restrained plaintiff which led to his death. *Id.*, 365 F.3d at 188. The Third Circuit Court in *Rivas* found that the plaintiff had established that the state actors had used their authority to create an opportunity for danger that otherwise would not have existed. *Id.*, 365 F.3d at 194-95. The Third Circuit explained that a jury could reasonably infer that the *actions taken* by the emergency personnel, i.e. reporting that the plaintiff was attacking them, placed plaintiff in greater danger. *Id.*, 365 F.3d at 195.

The finding that the fourth prong of the state-created danger theory had been met in *Rivas* is not contrary to the Third Circuit Court's decision in *Bright*. In *Rivas*, what placed the plaintiff in greater danger was the emergency personnel reporting that plaintiff had attacked them. This is what made it more likely that the police would be aggressive when they arrived at the house. It was an affirmative act that placed the plaintiff in danger, and therefore, *Rivas* is consistent with the test referenced in *Bright* and its holding. The Third Circuit Court in *Bright* explained why *Rivas* is not contrary to its decision:

> *Rivas* is not to the contrary. There, two state actors, emergency medical technicians, affirmatively used their state authority to create an opportunity for injury to the plaintiff by summoning the police and providing them with information that could be expected to cause the police to treat the plaintiff's decedent in a highly dangerous manner – *i.e.*, "Garcia and Rodriguez informed the police that Mr. Rivas had assaulted

> one of them but did not inform the police about Mr. Rivas's medical condition or warn the officers that Mr. Rivas should not be restrained." *365 F.3d at 195.* We perceive little similarity between that case and this.

Bright, 443 F.3d at 283, n. 6. Contrary to what the Plaintiff argues in his Petition for Writ of Certiorari, there is no intra-circuit conflict in the Third Circuit as to the state-created danger theory caused by the *Bright* decision.

CONCLUSION

None of the reasons set forth in Plaintiff's Petition for Writ of Certiorari compel this Court to grant review. There are no substantial conflicts between the *Bright* decision and any other circuit court. The *Bright* decision also is not inconsistent with this Court's precedent or other cases from within the Third Circuit Court of Appeals.

Although Plaintiff attempts to argue that the *Bright* decision conflicts with this Court's precedent, Section 1983, the Due Process Clause, other circuit courts' opinions and Third Circuit Court decisions, the actual basis for Plaintiff's appeal is that the majority in *Bright* allegedly misinterpreted the Third Circuit's state-created danger theory. Misapplication of an established rule of law does not equate with a reviewable substantial conflict though.

According to this Court's rules, it is not the function of this Court to second-guess interpretations of facts. If this Court did believe that any time it examined a set of facts, and perhaps would have decided differently from the court below, it would grant review, this Court would be flooded with even more cases than it already receives. Instead,

this Court serves the limited, but extremely important, purpose of reviewing cases for compelling reasons. It is respectfully submitted that such a role is not called into play in this case.

Undoubtedly, the facts pled in this case outline tragic events. The facts pled in *DeShaney*, *supra*, and *Castle Rock*, *supra*, also were tragic. As in the instant case, children in those cases were subject to vicious acts by private third parties. Regardless of how sympathetic the parties and the circumstances are in these cases, or how egregious the acts of private third parties, these attacks by private third parties cannot be considered a constitutional violation by the state when the state took no affirmative action which directly caused the increase in danger or harm that otherwise would not have occurred.

From the facts pled in Plaintiff's Amended Complaint, which were accepted as true by the district court and the Third Circuit Court, this is not a case where the state, through its probation officers and police, placed the Plaintiff in a position of danger from a private party, Koschalk, which she otherwise was not already in, and then failed to protect her. The alleged affirmative act, i.e. the confrontation between the probation officer and Koschalk, did not place the Plaintiff, the sister of the under-aged girl, in danger. It was the later delay in having a hearing on the probation violation which allegedly caused or emboldened Koschalk to retaliate against the family. This failure to act is not a constitutional violation. If this was considered a constitutional violation, then anytime a private citizen, who perhaps was committing a crime, was approached by a state agent, such as the police, but not immediately taken into custody, and then later committed a crime that the state failed to stop, there would arguably be a cause of action pursuant to the Due

Process Clause. The Due Process Clause and the state-created danger theory in any circuit, including the Third Circuit, do not impose such a broad duty on the state.

Wherefore, for all of the reasons set forth herein, Defendants respectfully request that this Honorable Court deny Plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

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